JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY

BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

New Series. 1901. No. 1.

Vol III

LONDON:

JOHN MURRAY, ALBEMARLE STREET

1901.

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PRINTED BY
HAZELL, WATSON, AND VINEY, LD.
LONDON AND AYLESBURY.

BIBL.
LONDIN
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THE LAW OF SOUTH AFRICA.

[*Contributed by* The Rt. Hon. Sir Henry De Villiers, Chief Justice of Cape Colony].

Theory and Experience.—A thoughtful article contributed by Mr. W. F. Craies to the August number of this Journal has raised the question whether the Roman-Dutch law, as modified by local legislation, should continue to be the law of the newly acquired provinces in South Africa. The writer admits that "it has been the general policy of the British Crown in dealing with conquered territory to interfere as little as possible with the existing laws and customs of the territory," but he considers that, owing to the uncertainty and antiquity of the Roman-Dutch jusisprudence, this policy should not be applied any further in South Africa. He cites some decided cases of the South African Courts in support of his view, but he evidently lacks that practical acquaintance with the actual operation of the system which is needed to check his theoretical conclusions. Every practising lawyer in South Africa knows that there is no greater difficulty in advising upon disputed questions of law as they arise than there is in England or Scotland. He knows also that he possesses in the jurisprudence of Rome, which had been silently transferred into the Dutch law before its introduction at the Cape, a treasure-house of principles to assist and guide him where other recognised authorities fail him. A difference of opinion among judges in the South African Courts upon disputed questions of law is of rare occurrence, and the number of appeals from the Cape Supreme Court to the Judicial Committee of the Privy Council bears a very small proportion to the appeals from other Colonies where the English Common Law prevails. It is no doubt true that a diversity of opinion is often found to exist between the text-writers on the Dutch law, but that is easily explained by the different periods at which they wrote. Critics are apt to forget that the jurisprudence of the Netherlands, like that of England, was a progressive jurisprudence; that many laws suited for the seventeenth century ceased to be suited to the needs of the nineteenth century; and that great changes were silently effected by legislation and by judicial decisions during the interval. There was an interval of nearly two hundred years between Grotius and Van der Linden, and the wonder is that the diversity between them is not greater than it is actually found to be.

Progressive Changes on English Models.—The law introduced into South Africa was that which was in existence in the Netherlands in 1806. Here also there has been continuous change and progress during the intervening period of nearly a century. The judicial system introduced into the Cape Colony by the Charter of Justice was modelled upon the system obtaining in England. The judges were empowered to frame rules of civil and criminal procedure, and in framing those rules they have been invariably guided and assisted by the rules in force in the mother country. At an early period the English Laws of Evidence were introduced by legislation, and in the decision of commercial cases for which no provisions existed in the Dutch laws, the judges borrowed freely from the laws of the country with which our commerce is mainly carried on. Their decisions are now regarded as authoritative by the Courts of South Africa, in the same way as the decisions of Lord Mansfield and his Court are regarded as authoritative by his successors in England.

The Code of Insolvency.—In 1843 an excellent Code of Insolvency Law was introduced which abolished the *cessio bonorum* of the Dutch law, and which, while retaining the rules of preference among creditors provided for by that law, created an inexpensive and equitable system for realising and distributing the assets of the insolvent. These rules of preference are founded upon the wholesome practice of registration of bonds which was taken over from the Dutch law. Just as every title to land must be registered to give the owner a real right to it, so every bond must be registered in order to give the mortgagee a right of preference over unsecured creditors of the insolvent. The Code of Insolvency introduced in 1843 has, with some slight modifications, remained in force up to the present time, and has served as a model for all the other Colonies and States of South Africa, with the exception of the German and Portuguese Colonies.

The Administration of Estates, Minors, etc.—In regard to the administration of the estates of deceased persons, the system under which the heir became liable for the debts of the deceased and distributed the assets was abolished, and a practice based to a great extent upon the English law was introduced. That practice has also been adopted by both the Republics. The last remark also applies to the Cape law for the protection of minors and lunatics. Their property is administered under the direct supervision of the State, and where no provision is made by will for the appointment of guardians to minors, the appointment takes place under the direction of the Master of the Supreme Court, and the funds are deposited in the Guardians' Fund. Out of that fund interest is paid to the minors, and the State is responsible for the security of the capital. Whenever any other laws were found to be out of harmony with the requirements of the increasing English population, they were amended, with the willing co-operation of the Dutch population. To enumerate all the instances would exceed the time and space at my disposal, but a few will suffice.

Freedom of Testamentary Disposition.—The law which compelled a parent to leave a portion of his property to his children was always acquiesced in by the Dutch, but resented by the English portion of the community. In 1874 a law was unanimously passed abolishing the legitimate portion and establishing complete freedom of testamentary disposition in the Cape of Good Hope. In the same way the Falcidian and Tribellianic laws were subsequently abolished, and an end put to the *Lex Hac Edictali* by which a husband was prohibited from giving to the children of a second or subsequent wife a larger portion than the least portion given to any of the children of his first marriage.

The Reform Commission of 1879.—Notwithstanding these and other amendments of the law, there was a feeling abroad that further changes were desirable, and a Commission was appointed in 1879 to make a full investigation into the matter. It was a representative Commission consisting of two judges—one of whom, Mr. Justice Dwyer, had never hesitated to condemn any particular law which he deemed to be unsuited to the age—one advocate in large practice, and two eminent solicitors, one of them having a large practice among the mercantile community and the other having an equally large practice among the Dutch agricultural population. The Commissioners were instructed to enquire into, and report upon, not only such portions of the colonial law as ought to be formally repealed as being obsolete, but also upon such portions as should be repealed or amended as being inconsistent with modern legislation and principles. They invited suggestions from every quarter, and afforded every opportunity to persons dissatisfied with the existing body of laws to come forward and state the grounds of their dissatisfaction. The result was that the Commissioners unanimously adopted certain resolutions for the amendment of the law, but it was truly marvellous to find how few the rules of law were with which fault was found.

—— **Its Report: Mercantile and Criminal Law.**—In their first report the Commissioners say: "Wherever the laws of Holland are silent, as they frequently are, in regard to mercantile transactions, or in regard to criminal matters, the Courts of the Colony have been guided by the principles of the law of England. In regard to the branch of law known as Maritime Law, Imperial legislation has assimilated the laws of the Colonies in some respects to those of Great Britain, but where Imperial or local legislation is silent, the Roman-Dutch law still guides the ordinary Courts of law in this Colony."

Shipping Law.—The Commissioners accordingly recommended that in all questions relating to Maritime and Shipping Law the law of the Colony should be assimilated to that of England. This recommendation was carried out by s. 1 of Act No. 8 of 1879. In their second report the Commissioners say: "The growing trade between this Colony and England renders it desirable that legislative sanction should be given

to the existing practice of following the English law in the decision of cases relating to negotiable instruments, fire, life, and marine insurance, bills of lading, and stoppage *in transitu*, in so far as this can be done consistently with local laws, customs, and judicial decisions."

Assimilation to Law of England: Law of Insurance, Bills of Lading, Bills of Exchange, etc.—It was accordingly resolved that the law relating to negotiable instruments, fire, life, and marine insurance, bills of lading, and stoppage *in transitu* should also be assimilated to the law of England. By s. 2 of Act No. 8 of 1879, the recommendation was carried out, with the exception of the part relating to negotiable instruments. The Attorney-General of the day was opposed to so drastic a measure, but by a subsequent Act, No. 19 of 1893, the English Bills of Exchange Act has been incorporated almost verbatim with the law of the Colony. Other recommendations of minor importance were made by the Commissioners and adopted by the Legislature in 1879.

Unproductive Leaseholds and the War.—Under the heading, for instance, of the Law of Contracts it was enacted that—"7. In the absence of any stipulations to the contrary contained in any contract of lease, no lease of land shall become void or voidable, nor shall the rent accruing under such lease be incapable of being recovered, on the ground that the property leased has through inundation, tempest, or such like unavoidable misfortune produced nothing." This clause was relied upon in a recent case in the Supreme Court as depriving a tenant of the right to abatement of rent where, in consequence of the state of war, he has had no beneficial occupation of the property let. It had been decided some fifty years before that a tenant is entitled to such an abatement, the decision being based upon a passage in Van der Linden's *Institutes*, which was as follows: "The lessee is entitled to demand the entire remission of the rent, or an abatement of part, according as he had no use on the thing let, during the whole or part of the time of the lease, unless this had been occasioned by his own act. To this head also appertain the case where through inundation, tempest, or such like unavoidable misfortunes the land has produced nothing." The Court now decided that the law, as laid down by Van der Linden, and applied to the case of a lessee deprived of the beneficial occupation of the land leased by reason of a state of war, had been repealed by the Act and that there was no longer any difference between the law of England and the law of the Colony in respect of such a lessee.

Company Law.—The report of the Commissioners contained no reference to Company Law, but in 1892, by Act No. 25 of that year, the whole body of English Company Law was introduced into the Colony.

English Definitions of Crimes.—In regard to the Criminal Law the Commissioners say: "As the proceedings of the Courts of law are conducted in the English language, the phraseology employed has generally

been borrowed from the English law. But in many cases the Dutch equivalent for a particular crime or offence does not correspond entirely with the term employed, and the result in such cases has been that the definition of the crime as given by the law of England has been followed in preference to that which is recognised by the law of Holland. As to punishments, the law of Holland has always been followed; but the latitude allowed is so great, and the punishment in some cases so excessive, that a revision of the scales of punishment has become well-nigh indispensable. The changes and improvements which may commend themselves to your Commissioners will be embodied in a Code which they hope to be able, in a future report, to submit for the approval of the legislature." Unfortunately, some of the Commissioners were unable to devote the necessary time and labour to the preparation of such a Code. The other members of the Commission would probably have proceeded with the work if they had not received an intimation from the Attorney-General of the day that there would be a difficulty in carrying a Code through Parliament.

A Native Penal Code.—A Native Laws Commission was appointed, which drafted a Penal Code for the Native Territories. That Code was based partly on the Indian Penal Code, partly on native customs, and partly on colonial law, and it was adopted by the Legislature. With slight amendments it may safely be adopted for the whole of the Colony. At the same time it is fair to state that the absence of such a Code has not of recent years been found to be practically inconvenient. A series of judicial decisions has defined the different crimes likely to be committed, and the punishments inflicted by the judges and magistrates have been in accordance with the more humane ideas of the age.

Dutch Punishments: Their Mitigation.—The Dutch law, it is true, allowed excessive punishment, but it did not fix a *minimum* sentence, and by tacit arrangement among the judges certain standards of punishment were gradually introduced. In this connection it should be borne in mind that it is not by legislation alone that the laws of South Africa have been gradually moulded so as to suit the requirements of the time.

Abrogation of Obsolete Dutch Law by Disuse.—South African usages have been allowed to prevail against rules of the old Dutch law, and the best proof of such usage has been held to be furnished by unoverruled judicial decision. The quotation made by Mr. Craies from the judgment in which this doctrine was laid down contains the obvious misprint of "overruled" for "unoverruled." Any Dutch law, it was there laid down, "which is inconsistent with well-established and reasonable custom, and has not, although relating to a matter of frequent occurrence, been distinctly recognised and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse." The particular decision in that case was that the rule of the Dutch law that "when a debtor was sued upon a ceded right of action he might discharge himself by paying the amount

which the plaintiff himself had paid for it" had been abrogated by disuse, and was no longer in force in the Colony. The wider effect has been practically to put an end to old Dutch laws which have never been recognised by the Courts of the Colony, and are out of harmony with well-established modern customs. It is fair to add that torture never was introduced into the Cape Colony, inasmuch as it had been abolished in the Netherlands before 1806.

The Roman-Dutch Law of Inheritance: Its Fitness.—It is quite true that, after all deductions have been made, there still remains a substantial residuum of Roman-Dutch law, but it is this very residuum which South Africans value and would be sorry to see abolished. The Law of Inheritance, for instance, as it now stands, is suited to the needs of the people, and gives satisfaction to English and Dutch alike. There exists free testamentary disposition, but, failing a will, the rules for the devolution of property are such as natural affection would prescribe, whatever the nationality of the deceased might be. No distinction is made, as in England, between land and movable assets. The executor, nominated by will, administers the whole estate, and, failing such nomination, an executor dative is appointed by the Master of the Supreme Court upon the nomination of the next-of-kin.

Husband and Wife.—In regard to the laws which regulate the mutual rights of husband and wife, the general tendency of legislation in England has been in the direction of the system which prevails at the Cape, and it would therefore be the height of absurdity for the Colony to adopt the English system. Divorce on the ground of adultery has always been admitted as a matter of right. The distinction, however, between a guilty husband and a guilty wife is not admitted, and there are few Englishmen in the Colony who would desire the introduction of such a distinction. There are, however, some, especially amongst the clergy of the Church of England, who would desire the repeal of the law which permits divorce on the ground of malicious desertion.

Divorce for Malicious Desertion.—The ostensible objection to the law is that it sometimes leads to collusion, but the real objection is the alleged sacramental nature of the marriage bond. Both objections would, however, equally apply to the law which allows divorce on the ground of adultery. Before a divorce on the ground of malicious desertion can be obtained, there must be clear proof that the defendant has left his or her spouse without reasonable or lawful cause, and has refused to cohabit with her or him after having been called upon by rule to show cause why such defendant should not return. It is possible, of course, that there may sometimes be collusion, but the instances must be very rare, because the practice of the Courts is to carefully scrutinise the facts of each particular case. But even if the cases of collusion were more frequent than they really are, the evils would be less than those arising under a system which compels a husband or wife to maintain a purely nominal union with one

who has maliciously and without lawful cause deserted him or her and has broken the most essential part of the contract upon which the marriage union is founded.

Antenuptial Settlements and Community of Property.—For the rest, no objection is ever raised to the law which permits persons about to marry to regulate their respective rights of property by antenuptial contract, but declares that, where no such contract is made before marriage, there shall be community of property between them. In practice, few persons who have property nowadays fail to make a contract before marriage, but there is no injustice in a law which declares that, if the parties themselves do not make an agreement to the contrary, they shall be deemed to have entered into a universal partnership. The result of the community is that one half of whatever each acquires vests in the other spouse, and that upon the death of the one without making a will half of the joint estate devolves on the survivor, and the other half on the heirs of the deceased. It is customary, however, for persons married in community to make what are known as mutual wills, by which they make an equitable distribution of property after death. Such a mutual will is not binding on the survivor, so far as his or her half is concerned, unless he or she has accepted benefits under the will after the death of the deceased, but after such acceptance, or "adiation," as it is termed, the survivor is bound to carry out the directions of the will, even if they interfere with the free disposal of his or her half-share of the joint estate. It is not the purpose of this article to travel over the wide domain of Roman-Dutch law which has been left untouched by legislation or judicial decision. It is sufficient to add that the laws relating to suretyship, to novation, and to kindred matters resemble the laws of England in many respects, not because they have been borrowed from the laws of England, but because, in the exercise of their equitable jurisdiction, English chancellors have made free use of the many equitable doctrines of the Roman law.

Federation and Codification.—In concluding his article Mr. Craies suggests that during the period which must elapse before representative government is regranted to the former Republics, a Commission should be appointed to codify their laws. "There is little doubt," he adds, "that, quite apart from any federal arrangement, such Codes, if carefully prepared and judiciously discussed, would be adopted by the Colonies which now have autonomous government." He does not, however, give his reasons for this decided expression of opinion. However "carefully framed and judiciously discussed" such Codes may be, it is reasonably certain that the Cape of Good Hope, at all events, would not adopt them, unless they are based upon the admirable system of laws which that Colony at present possesses. The proper time for codification will be after the Colonies and States have been federated. In the meantime the more convenient course would be to assimilate the laws of the newly annexed States to those of the

Cape of Good Hope. The local Statutes of these States, such as the Gold Laws, should of course be retained, but all the alterations which the Roman-Dutch law has undergone in the Cape Colony should be incorporated with the laws of the new Colonies. This was the course adopted in regard to the other recently annexed territories in South Africa, including Rhodesia, to the entire satisfaction of the inhabitants of those territories. When once federation has been accomplished, there will be time to think of and prepare a Code of laws for the whole of South Africa. A Code prepared during a period of transition by a body of Commissioners nominated by the Crown and not representing the people for whom the laws are intended would be productive of more harm than good. At its best, codification, by introducing the principle of finality into law and checking its spontaneous growth, is not an unmixed good, but it becomes an unmixed evil if carried out without due care and deliberation and merely for the purpose of stereotyping a body of laws which a certain number of lawyers, having no representative capacity, may consider to be the best adapted for the needs of a particular community.

CRIME AND PUNISHMENT FROM THE COMPARATIVE POINT OF VIEW.[1]

[*Contributed by* MONTAGUE CRACKANTHORPE, ESQ., K.C.]

The Need of Self-Criticism.—In the current number of the *Nineteenth Century—and After*, Dr. Robert Anderson, the Assistant Commissioner of the Police of the Metropolis and Head of the Criminal Investigation Department, informs the public that "our system of punishment is absurd and mischievous," that "our law is daily brought into contempt with those to whom it ought to be a terror," and that "in the matter of crime neither science nor common sense is allowed a hearing." These startling statements, although to my thinking overdone, deserve serious attention, coming from the quarter they do, and, whether we agree with them or not, may be turned to a profitable account. To begin with, it is not a bad thing to have our self-complacency ruffled, our comfortable optimism disturbed, if we are thus led to review our established methods, and to seek some means of improving them. Again, when we are told by a competent authority that our system of punishment is "absurd," we may usefully enquire whether it is better or worse than it was, and in what respects it differs from the systems pursued elsewhere. To inaugurate such an enquiry is the object of this paper, holding, as I do, that the policy of splendid isolation is as foolish in criminology as it is in the conduct of foreign affairs. The time allotted to me being limited, the field I shall traverse must be limited also, and you must expect to note many gaps and shortcomings which will have to be made good on some future occasion.

Modern Penal Law: Its Double Aspect.—Modern Penal Law of the best type may be not inaptly described as "a weapon of social defence, tempered by justice to the individual criminal." Which of the two halves of this description is the more important it is not easy to say. If we leave out the element of social defence, we rob punishment of its most useful office—that of serving as an example and a warning. If we leave out the idea of justice to the individual criminal, and look only to the sense of public danger aroused by his crime, we make the tacit, but erroneous, assumption

[1] An address delivered at a meeting of the Society, February 27th, 1901.

that all men are equally responsible for their actions, equally capable of self-control.

Obvious as this twofold notion of punishment appears to most of us at the present day, it has only been recognised in comparatively recent times. "In the earliest periods of English history," says Sir James Stephen, in his monumental work on the subject, "crimes were regarded as private wrongs, revenged rather than punished by those who were injured by them, first by private war, afterwards by summary execution, and then by a public demonstration of justice, slowly organised in such a way as to bear many traces of the rough system, if so it can be called, which it gradually superseded." In another passage he says: "The Criminal Law proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies this sentiment by inflicting punishments which express it." This point of view he regards as "healthy, natural, and deserving of encouragement," but it is clearly a view of *crime as crime*—that is to say, from its *objective* side only, and leaves little room for taking into account the temptations, the inherited temperament, or the external circumstances of the offender.

The Social Defence Theory of Beccaria.—The man who more than any other, not excluding our own Bentham, inoculated the civilised world with the social defence theory of punishment, was the Marquese Beccaria of Milan, whose celebrated work, *Dei Delitti e delle Pene*, was first published in 1770, and speedily translated into every European language. Here are the opening sentences of his seventh chapter:—

> The foregoing reflections justify me in asserting that the only true measure of crime is *the damage done to the community*, and that therefore those are in error who believe its true measure to consist in the intention of the wrong-doer. This intention must depend on the impression derived from external objects and on the previous mental disposition of the offender. But these vary in every one of us with the swift succession of our ideas, passions, and circumstances. It would, therefore, be necessary, on this hypothesis, not only to frame a special code for each citizen, but a new law for each crime. It often happens that men with the best intentions do the greatest harm in society, and on the other hand it often happens that with the worst intentions they do it very great good.

Its Adoption in France.—The French Penal Code of 1810 reduced this theory of Beccaria to practice. To such and such crimes it affixes such and such penalties, within legal limits as precisely defined as are the grooves of the guillotine. The previous history of the accused, the provocation he has received, do not enter into the calculation. The individual is a cipher, an abstraction; his will is assumed to be absolutely free, his responsibility perfect. Just as under the French educational system it was intended that every pupil at the *lycées* should construe the same line of Homer or Virgil at the same hour of the same day, so under the French

penal system the same punishments were prescribed for the same crime, whatever the motive or excuse for it may have been. The nearest parallel to this in medicine would be a treatise which laid down that there were no sick men—there were only diseases.

No criminal system of rigid equivalents, from which the facts of human nature are omitted, can long remain in equilibrium. The first blow the French Penal Code received came from the French juries, who did precisely what English juries did when sheep-stealing was a capital offence. Rather than subject the prisoner to the prescribed penalty, they brought in a verdict of acquittal, however clear the proof of his guilt. In England this judicial scandal was stopped by rendering the Penal Law less harsh. In France, it was met, not by altering the Code, but by special legislation which permitted, first the judge, and afterwards the jury, to attach to the verdict a rider of "extenuating circumstances." When these have been found the French law alters the character of the crime, shifting it from a higher to a lower plane, and brings into operation automatically a lower scale of punishment.

The Reformation Theory of Rossi.—It is interesting to contrast with this Code of 1810 the Code which was promulgated in Belgium half a century later, when the views of Beccaria had ceased to prevail, and those of Pellegrino Rossi were in the ascendancy. Rossi held that social defence was only a secondary object of punishment, its primary object being the re-establishment of public order and the reformation of the criminal. The Belgian Code is framed on these lines, and is consequently much more humane than the French. In the French Code, for example, attempts to commit crime are treated with the same rigour as the crimes themselves, and accessories are punished as if they were principals. The Belgian Code makes a distinction in each case in favour of the accused. Again, in the Belgian Code, greater scope is given to "extenuating circumstances"—they are made applicable to *all* offences; whereas in the French Code they are applicable only to a certain number. In a word, the *objective* view has given way to the *subjective*; that is to say, the idea of personal justice to the criminal has in Belgium usurped the first place in punishment, and has thrust the social defence theory into the background.

The New Subjective View.—A still further development of the subjective view of crime and punishment has manifested itself during the last thirty years. Whereas both in the French and Belgian Codes every criminal is assumed to be completely responsible unless his mental condition is proved to be such as to render him "incapable of discernment," a school has sprung up which maintains that this is but a superficial view of the matter, betraying ignorance of human nature and human affairs. The disciples of this school regard the criminal as the complex product of the propensities he has inherited and the atmosphere in which he has been brought up They therefore contend for a limited responsibility, which lies half-way between plenary free will and complete mental alienation. Amongst the foremost

advocates of this doctrine are: in France, MM. Tarde and Lecassagne; in Belgium, M. Prinz; in Russia, M. Fornitzki. In Italy, the subjectivity of the criminal has been pushed to its extreme point by Lombroso and Garofalo, though these two last are by no means agreed as between themselves. Lombroso is an anthropologist who lays principal stress on the physiological peculiarities of the criminal, whereas Garofalo insists more on the influence of the social factors of life. In Germany, the connection between crime and its causes forms a separate department of study under the name of "*das Kriminalpolitik*," one of its most powerful living exponents being Franz von Lizt, Professor at the University of Berlin. This study must obviously be conducted on the same lines in all countries which have attained a similar degree of civilisation; and involving, as it does, a comparison of general economic laws, it properly falls within the scope of the labours of this Society. At all events, it figured on the programme of the Congress held last autumn in Paris under the auspices of the Société de la Législation Comparée, which I had the honour of attending as one of your representatives—a Society, I may observe, the title of which, although identical with our own, imports a wider signification, since the French word "*législation*" embraces both customary and statutory law, while the English word "legislation" denotes statutory law only.

Before such an audience as this, I need not dwell on the value of the comparative method, and I therefore pass on at once to apply that method to one or two leading features of our penal system, beginning with that which comes first in natural order, namely, the treatment of juvenile offenders.

America and the Reformatory System.—In England we are justly proud of our reformatory schools, but we are apt to forget how much we are indebted for them to the example set by other nations. Long before the Reformatory Act of 1854 was passed, steps in the same direction had been taken in America. So far back as the year 1825, the State of New York granted a charter to an institution known as the New York House of Refuge, which was placed under municipal control. This institution grew out of the efforts made by the American jurist, Edward Livingstone, and other enlightened philanthropists. The example of New York was quickly followed by other States of the Union. In 1826 a similar reformatory was opened in Boston; and another in 1828 in Philadelphia. There are now some fifty such reformatories in North America, the time of the inmates being about equally divided between productive labour and the acquisition of religious and useful knowledge. In all these establishments, however, there is one important element wanting. There is nothing to bind the young people together, nothing to remind them of the family ties from which they have become dissassociated.

German and French Family Group Systems.—The Germans, always fertile in invention, supplied this defect by conceiving the idea of uniting the

inmates in family groups, under a head who was styled the "father," the most trusted members of the group being known as "elder brothers." This experiment was first applied with success at the Agricultural Reformatory of Rauhenhaus, near Hamburg. It was still further improved upon at the Agricultural Colony of Mettray, which was founded in 1829 by M. de Metz, a French ex-magistrate, in conjunction with the Vicomte de Courteilles, a French ex-officer. The number of each group at Mettray is fifty, and though the family relationships there are artificial, they are practical instruments for good. It is the business of the head of each group to make the intimate acquaintance of every member of it, to study his peculiarities and his temperament, and to adapt his teaching accordingly. M. de Metz consecrated his life to enquiring how this could best be done, and his successors have conscientiously followed in his footprints.

But M. de Metz did not content himself with founding a colony for young persons who had been convicted of crime. He recognised the fact that there are many youths who, without being offenders against the law, have got completely out of hand, and whose future seems to be fraught with disaster. The French Civil Code provides for such cases by empowering a parent to apply to the chief magistrate of his district for an order for the detention, at the parent's expense, of a child against whom he may have grave cause of complaint (*sujet de mécontentment très grave*), such detention to last for a period not exceeding one month when the lad is under sixteen, and not exceeding six months when he is between sixteen and twenty-one. Before the French Law of August, 1850, the place of detention would have been a house of correction, and since that Law a penitentiary colony. No self-respecting parent would, however, consent to place his son in such a position, and the provision of the Code to which I have just referred was therefore almost a dead letter until M. de Metz, in 1835, conceived the idea of founding a fresh establishment at Mettray, which should meet this very class of cases.

The "Maison Paternelle."—This establishment he called the "Maison Paternelle," and made it quite distinct from the colony. Lads who are sent there live in separate apartments, communicate only with their tutor or director during the period of their detention, and are subjected from first to last to a curative moral treatment. The subjects of instruction are literature, science, and languages, lessons being also given in music, fencing, and riding to those who can afford to pay for them. Many a former pupil of the "Maison Paternelle," now occupies a good position in the army, at the Bar, and in other walks of life. The utmost secrecy is observed with regard to the identity of the pupils, whose names are known to the director only. The order of detention is nowhere registered, and is torn up as soon as it has ceased to operate. When I visited this colony some years ago and saw how admirable its arrangements were, I could not help thinking that the French had solved the question

which we sometimes hear put in England— "What are we to do with our unmanageable boys?"

"Conditional Condemnation" and Young Offenders.—Akin to this reformatory treatment of the young offender is the practice of "conditional condemnation," both alike being designed to avert the stigma which attaches to actual imprisonment. This practice was first introduced in the State of Massachusetts, and is thus described by Mr. Douglas Morrison, the late Chaplain of Wandsworth Gaol:—

> The juvenile offender after being convicted and admonished is placed in charge of an official who is called a probation officer, the sentence passed on him being called a sentence of probation. It is the duty of the probation officer, during the time that the juvenile is under his surveillance, to watch over his conduct, and if it is unsatisfactory to report the circumstances to the Court. The sentence of probation does not prevent the child from returning to his home and his family, and in this way parental authority is respected and parental responsibility is maintained.

Our own First Offenders Act, 1887, under which the juvenile (or other person to whom it is applied) may be required to "come up for judgment when called upon," operates, as is well known, without the medium of a probation officer; with the result that many children whose parents cannot be trusted to look after them have to be sent to a reformatory, and in most cases maintained out of public funds.

The Loi Bérenger of 1891, the French analogue of the First Offenders Act, 1887, differs from that Act in an important respect. With us, the first offender is not told what punishment he has rendered himself liable to, and no defined sentence is recorded against him. If he is called up for judgment at some future time by reason of his relapse into criminal ways, the judge before whom he is brought has generally nothing to go upon beyond the original indictment and conviction. By the Loi Bérenger the first offender has furnished him by the judge *the precise measure of punishment* which, but for the Law, would be inflicted on him, and is constantly reminded that whether that sentence is carried out or not is a matter resting entirely with himself. In October, 1893, I drew public attention to this difference, and suggested that it would be well to introduce the French fashion here. Further reflection has induced me to modify this view. The best course now appears to me to be to leave it to the judge to decide in each case whether he will pronounce a defined sentence or not. Sometimes it may be expedient to do so, sometimes inexpedient. For instance, if a youth or an adult is found guilty of embezzling his master's money, but his antecedents are such as to entitle him to the benefit of the Act, a defined sentence may do good. On the other hand, in a case such as that which occurred at the last Westmorland Quarter Sessions, where a woman suffering from physical depression, but shown to be responsible for her actions, was convicted of attempting suicide, if the Court had pronounced a defined, albeit inoperative,

sentence, it would probably have induced a fresh fit of depression and so have brought about a repetition of the crime.

The Habitual Criminal.—Next to the youthful offender, the case which to many judicial minds offers the least difficulty is that of the criminal who has been several times times convicted. I say to *many* minds, not *all*, because all judges are not agreed as to the weight to be given to previous convictions. Some hold that each crime should be dealt with on its own merits (or demerits), and that, until an Act of Parliament shall direct the contrary, the fact of a previous conviction should be altogether ignored. Others hold that when a man has once been in prison and commits a crime a second time, he should receive a sentence greatly in excess of that which would be awarded if we were a first offender. Sir Henry Hawkins (now Lord Brampton) drew attention to this anomaly in an article which he contributed in 1883 to the *New Review*; and the conclusion he came to was that when any two judges differ in their treatment of the habitual criminal, "either the one or the other of them has but imperfect knowledge of, or takes an erroneous view of, the true principles upon which punishment should be awarded." Dr. Anderson, in the article already mentioned, is still more emphatic in his criticism of our present system of dealing with hardened offenders :—

> As a citizen (he says) I appeal to my fellow-citizens to bring their intelligence and common sense to bear upon the subject. Here is a man who has outlawed himself by deliberately and systematically following a criminal career. Sentences of imprisonment, varying in duration from two months to ten years, have had no effect upon him. And now, when once again brought to justice, he is to be shut up for a few years more, and then again released to resume once more the practice of his profession. And this is not the decision of the inmates of a lunatic asylum; it represents the mature wisdom of the wisest race in the world at the end of the much-belauded nineteenth century. The grounds of this decision are about as reasonable as the decision itself. Owing to the decrease in ordinary crime, sentences are now so limited that they have ceased to be a terror to the professional. Could an intelligent public but see behind the scenes, the prevailing sentiment against severe sentences would give place to a crusade against short sentences. If an Act were passed fixing twelve months' imprisonment as a minimum sentence and consigning the worst sort of professional criminals to the gallows, it would, I believe, though ill advised, be better and more humane than our present methods."

The "Récidiviste" in Foreign Codes.—Without entering here into a discussion of this passage, let me invite you to compare the practice it condemns with that of foreign countries. I believe it will be found that every European Code, except the Spanish, *requires* the *récidiviste* to be punished more severely than the first offender.

——**In Germany.**—By the German Penal Code of 1876 a second conviction for theft, robbery, or concealing stolen goods is punished very heavily.

——**In France.**—By the French Penal Code of 1810 *récidivisme* is treated as a *circonstance aggravante*, and the judge *is obliged* to award a punishment of a severer class than that which would otherwise be legally applicable. For example, if a man who has been condemned to forced labour for life commits a second crime which carries with it the same punishment, he *must* be sentenced to death ; if the second crime carries with it a sentence of deportation, he *must* be sentenced to forced labour for life ; if it carries with it forced labour for a term, he *must* be sentenced to the maximum of the punishment prescribed by law, and may be sentenced to double that maximum. By a special Law of May 27th, 1895, a special form of punishment called *relégation* was devised for the *récidiviste*, consisting in perpetual banishment to a French penal colony or possession. This Law establishes certain criteria by which the judge shall determine whether *relégation* shall be inflicted or not ; but, once these criteria are satisfied, it leaves him no discretion as to the sentence to be pronounced. All *récidivistes* are to be condemned to *relégation* who, during the last ten years, have received certain sentences (or rather sets of sentences), which are grouped as follows : two of forced labour ; four of imprisonment of more than three months for certain specified offences ; five of imprisonment of less than three months for offences of a lighter class, *plus* two for offences of a graver class. In fact, the French law sets up a complete table of penal weights and measures, or, to put it algebraically, frames a series of penal equations in which the variables are the previous convictions and *relégation* is the invariable result.

——**In Italy.**—Just as the French law with regard to *récidivisme* is more elaborate than the German, so the Italian law is more elaborate than the French. The Italian Code of 1889 makes it imperative on the judge to give effect to a previous conviction in certain cases. Art. 80 provides as follows :—

> Wherever a man, who has been previously convicted, shall within ten years of the expiration of his sentence, if such sentence was more than five years, or within five years of its expiration if it was less than five years, commits another offence, *he shall not be punished* with the minimum punishment for such other offence.

The article then proceeds to prescribe by how much a sentence is to be increased where the prior offence is similar in kind to that to be adjudicated on :—

> If the new offence is of the same kind, (*della stessa indole*) as the old one, the offender is to undergo an increase of punishment according to the following scale :—
>
> (i) If the punishment for the new offence is *reclusione*, the ordinary length of continuous imprisonment is to be increased by one-sixth of the term which would otherwise be awarded for the offence under adjudication.
>
> (ii) If the punishment for the new offence is any other than *reclusione*, it is to be increased by from one-sixth to one-third.

Art. 81.—Whosoever, after undergoing a sentence restrictive of personal liberty longer than three months, commits within the periods mentioned in Art. 80 another offence of the same kind which also carries with it a restriction of personal liberty shall undergo an increase of punishment of one-half when the punishment incurred is not less than thirty months' imprisonment, and in three cases of one-third, subject, however, to the condition that in no such case shall the total term of detention exceed thirty years.

Art. 82 classifies offences for the purposes of the two preceding articles.

It is no part of my business to-day to attempt to examine the merits of these several modes of treating the habitual criminal in England, Germany, France, and Italy respectively, still less to discuss the other points of difference between English and Continental Criminal Law. All I desire to do is to invite you to consider how these differences may be used to our own advantage. Obviously the first step in this direction is to be able thoroughly to appreciate them, and I believe there is no better method of arriving at this appreciation than through the medium of international congresses, where the representatives of opposing views may be confronted with each other.

The Value of International Congresses.—It is, I am aware, a habit of some persons to deride all congresses, to regard them as mere machines for turning out unprofitable talk without any practical result. I do not at all agree. In the first place, the meeting of representative persons of different nationalities for a common purpose is a factor that makes for peace, and in these days no expedient should be scoffed at which tends in that direction. In the second place, the congresses which have been held on the subjects with which we have been dealing have been particularly fruitful. Take, for instance, the International Penitentiary Congress held in 1872 at the Hall of the Middle Temple, under the presidency of the late Lord Carnarvon. The object of this Congress (I quote from its official programme) was "to compare experiences as to the working of different penal prison systems and the effect of various systems of penal legislation; to compare the deterrent effects of various forms of punishment and treatment and the methods adopted for the repression and prevention of crime." When the Congress assembled it was found to comprise experts from nearly every civilised nation. No less than twenty States were represented—every European nation was there except Portugal, and amongst non-European nations, the United States, Mexico, Brazil, and Chili. Did its ten days' sittings produce no result? Those who say so can never have taken the trouble to enquire into the matter, as may be easily shown.

Some Fruits: The Classification of Prisoners.—One of the questions then discussed was whether prisoners should be classified, no such classification up to that time having been attempted. The Congress declared that classification, however imperfect, was preferable to entire absence of it, that criminals who made crime a calling and preyed upon society should be placed in an entirely different category from those whose crimes were

due to sudden uncontrollable impulses, not being the result of a degraded nature or a vicious course of life. So far from these declarations having yielded no fruit, it is mainly owing to them that the classification of prisoners has been adopted. In 1880, the Star class was established for first offenders in our convict prisons—that is to say, separate groups were formed, distinguished by wearing a star on their clothes, who were strictly segregated from the habitual offenders. The like practice was ordered to be followed in our local prisons by the Prison Act of 1898 and the rules made under it. A Court of law may now, as you are aware, take into account the character of the offender as well as of the offence, and direct him to be dealt with in any one of three divisions, to each of which separate prison treatment and varying degrees of severity are allotted.

—— **The Training of Prison Warders.**—Another matter discussed at the London Congress was whether training schools should be formed for prison officers, or whether, as the practice at that time was, they should only learn their duties by actual prison experience. A Prison Congress held at Cincinnati had already passed a resolution to the effect that special training as well as special qualities of head and heart were required to make a good warder, and that the administration of punishment would never become uniform or scientific until it was raised to the dignity of a profession, and men were specially trained for it as for other pursuits. This point has also been carried. The superior prison officers are now appointed by the Secretary of State, the other officers by the Commissioners; but one of the conditions which the Commissioners impose is that the candidate shall before entering on his duties undergo a four months' course of instruction at a training school. Four such training schools have been formed, at which men are taught the practical details of prison routine, and lectures are given on general subjects connected with prison administration. Mr. Ruggles Brise, the Chairman of the Prison Commission, has lately testified to the value of these training schools, which he says have proved of the greatest benefit.

In France, the effects of the London Congress of 1872 were not less marked. It stimulated the formation of the Conseil Supérieur des Prisons, a permanent State institution, whose special function it is to study the penitentiary system; the formation of the Société Générale des Prisons; of the Société Générale de Patronage, modelled on the English Discharged Prisoners' Aid Society; and of the Société Protectrice de l'Enfance, whose sphere of action corresponds in many respects with that of the managers of our industrial schools.

—— **The Cellular System.**—In Austria, Denmark, and Russia the Congress led to the adoption of the cellular, or Pennsylvanian, system for short-term prisoners, and of the association, or Auburn, system for long-term prisoners. In Italy, Norway, Sweden, and Russia training colleges for prison warders were founded, the one in Russia being a model establishment.

Even in Spain the Congress caused public opinion to move. A Commission of Penitentiary Reform was started at Madrid, and Alfonso XII. laid the first stone there of a model cellular prison. In Germany the effect was less marked, but an impetus was given to the revision of German Criminal Law, and the Penal Code of 1876 was the result.

If time permitted, it would be worth while to pursue this train of thought and to enquire into the influence exerted on public opinion—by which I mean enlightened public opinion, not the opinion of the "man in the street"—by the other Penitentiary Congresses held successively at Stockholm in 1878, at Rome in 1885, at St. Petersburg in 1890, at Paris in 1895, and at Brussels in 1900. But this would take us too far afield, and I propose, therefore, to utilise the few minutes at my disposal by reverting to the Paris Congress of last August and rendering to my colleagues on the staff of this Society some account of the stewardship with which they entrusted me.

The Paris Congress, 1900.—The very first day that I took my seat in the École de Droit as one of the presidents of the Criminological Section, I assisted at a lively discussion of the principles on which punishment should be administered. Various schools of penology were represented, and, the audience being composed of numerous nationalities, you may imagine that there was considerable difference of opinion expressed. After the debate had gone on for some time, a request was made to me, as the only Englishman present, to explain to the Section what were the guiding principles which actuated our judges when they came to pronounce sentence. I confess I was somewhat taken aback by the invitation. I had been recently employed in combating on paper the views expressed by an eminent judge of the King's Bench Division in an address, delivered in 1898 at Buffalo to the American Bar Association—views in complete accordance with those of a distinguished Lord Justice who, although he had little experience of criminal matters during his judicial career, ranks as one of the ablest and clearest thinkers of our day. I had reason to believe that the views of both these authorities were repudiated by many members of the English Bench, and that some of these same members had lately been making an effort to come to an agreement amongst themselves as to the normal sentence to be awarded for certain offences of frequent occurrence without reference to any theory whatever. What, then, was to be my answer to the question put to me by my foreign *confrère*? I was at first, I own, disposed to follow the example of the author of the celebrated chapter on "Snakes in Ireland," and to reply that no common standard, no common principle of punishment, had as yet been arrived at by our judges, but that each followed his own sweet will within the limits allowed him by the law. But then I remembered that to an assemblage of jurists and philosophers I might appear to be giving our judiciary away. I, therefore, took a course which I hope was not inconsistent with truth and candour. I replied that

our judges were still *seeking for the right principles*, and suggested that it would be desirable that representative men of other nations should assist them in their quest. Owing to a fortunate accident, this suggestion was received with acclamation. It chanced that amongst the audience was M. Raymond Saleilles, the author of a work on the *Individualisation of Punishment*, in which every conceivable penal system is most ably discussed.

M. Saleilles.—In the course of that work M. Saleilles explains that there are three ways in which one may ascertain both the nature and duration of a criminal sentence, viz. :—

(i) As in the Continental Codes, by statutory enactment of maxima and minima.
(ii) As in England, by giving the judiciary a free hand within very wide limits.
(iii) As in New York and other States of the American Union, by conferring a limited discretionary power of liberation upon the prison authorities.

M. Saleilles was, I found, as much alive as any Englishman to the desirability of criminal sentences being made more consistent with each other, not only in each individual country, but also as between different countries wherever the forms of prison discipline are approximately the same. A desire was expressed by him and by others that my proposal should be reduced to form, in order that it might be put as a resolution before the Congress. This task was kindly undertaken by M. de Poittevin, Professor of Criminal Law of the University of Paris, who was seated by my side.

Seeking the True Principles of Punishment: A Commission.—A day or two later, the following resolution, which, with your permission, I will read in the original French, was adopted by the Congress at its closing sitting without a dissentient voice :—

(i) Une commission scientifique internationale, se réunissant à Paris, est chargée de rechercher les idées directrices qui pourraient être recommandées aux juges dans la mesure des peines.
(ii) Cette commission pourrait étendre ses travaux à l'étude des peines, considérées au point de vue législatif (non plus seulement au point de vue judiciaire), et considérées au point de vue de leur nature (non plus seulement au point de vue de leur durée).
(iii) Comme moyen d'action, cette commission provoquerait dans les Congrès (internationaux ou nationaux) l'étude des propositions qui lui paraîtraient désirables.
(iv) La commission se composera de l'auteur de la proposition, M. Crackanthorpe, d'un délégué de la Société de Législation Comparée, d'un délégué de la Société Générale des Prisons, d'un délégué de l'Union Internationale de Droit Penal.

The Judiciary and our Prison System.—There is one point in the resolution I have just read which is certainly novel, and is to my mind of supreme importance. In providing that one of the members of the

commission shall be appointed by the Société Générale des Prisons, the resolution seeks—I believe, for the first time—to bring an expert on prison discipline into close personal contact with experts on the theories of sentencing. These two subjects have been too long kept apart. How many of our judges and magistrates, who, with the help of such light as the police can shed on the prisoner's antecedents, ponder carefully over the *length of sentence* to be passed on him, know precisely what is the *nature of the punishment* that sentence will entail? How many of them have visited our convict and local prisons and informed themselves accurately of what goes on there day by day? No doubt a certain proportion have conscientiously done this, but I undertake to say that, taking the judiciary all round, they are in the minority. If it were otherwise, it is inconceivable that the official voices hould not have been more loudly raised in favour of greater elasticity of prison treatment. Private and irresponsible persons have called attention to this matter again and again, but the Government, with masterly inactivity, has declined to move. It has been satisfied with leaving things as they are; indeed, so little has it desired information from without that it was not till 1895 that it permitted an accredited representative to attend any Prison Congress whatever. Dr. Anderson to his credit has had the courage to speak out. He declares that the uniform severity of our penal servitude system is a serious obstacle to the elimination from our midst of those professional criminals who are a standing menace to the peace of the community. He urges that on the inveterate and irreclaimable coiners, blackmailers, and burglars who are now permitted after a few years' incarceration again to prey upon society and to propagate their kind, a greatly prolonged sentence should be passed, with this alleviation—that in its later stages prison discipline should be greatly relaxed.

Wills J. on Short Sentences.—Mr. Justice Wills appears to entertain the same view, to judge by the letter which appeared over his signature in the *Times* of February 21st last. Over and over again, he there tells us, he has been compelled to make a sentence far shorter than the safety of society, in his opinion, demanded, in spite of his full conviction that the moment the prisoner was released he would be at his evil work again. And why? Because a long-continued application of such severity as is involved in penal servitude is almost too much punishment for any crime and would be certain to cause something of a revolt against itself. He therefore asks for an enquiry as to the most effectual method of ascertaining who are professional criminals and as to the best method of dealing with those found to be such. He adds that "if all the knowledge which must be accumulated and all the thought that must be bestowed on the subject be brought to bear before anything is done, there is, in his opinion, reasonable hope of arriving at a useful result." Such an enquiry as Mr. Justice Wills suggests will, I conceive, form part of the labours of the new commission.

Hopes from an Interchange of International Ideas.—I will not detain you, gentlemen, by attempting to forecast what the result of these labours will be, and I have now only one word to add. I am aware that commissions often fail in their object. We have lately had a remarkable instance in this country, where the existence of a minority report, in many respects in complete accord with the report of the majority, has nevertheless paralysed all legislative action. In France I have heard commissions spoken of as first-class funerals (*enterrements de première classe*), but these have been usually of the kind that Governments grant for political reasons and as a sop to troublesome opponents. Thank God the subject of crime and punishment stands far aloof from party politics. A free interchange of international ideas on such a subject cannot do harm and may do much good. I trust that this commission will be unanimous, and that I (or my successor) may at no very distant date be in a position to present to you a body of carefully sifted opinion, capable of being translated into rules for practical guidance.

THE RIGHTS OF RAILWAY PASSENGERS IN RESPECT OF UNPUNCTUALITY.

[*Contributed by* W. M. Acworth, Esq.]

The Contract of Carriage.—Were it not that a fundamental maxim of English law declares such a thing to be an impossibility, a lawyer might be inclined to say that unpunctuality of passenger service is in England a wrong without a remedy. As carriers of goods, railway companies are at Common Law, with certain well-known exceptions, insurers; and the Legislature has taken care that they shall not be relieved of any portion of their Common Law liability unless (*a*) the consignor or his agent accept in writing the limitation of liability, and (*b*) the Court holds the limitation just and reasonable. As carriers of passengers, railway companies start with less responsibility, being only liable for negligence, and, moreover, there is nothing to prevent them making such conditions as they please further limiting that responsibility. In practice what happens is this: The official time-table of the company, showing a train starting and arriving at a certain time, is *primâ facie* one of the conditions on which the contract of carriage is based. But the ticket issued has on the face, "See back." On the back is a further notice that tickets are only issued subject to the conditions stated in the company's time-tables. Finally, the time-tables themselves—which the company is under no obligation to, and often does not keep in, print, and which not one passenger in a hundred ever sees—contain, usually in small print and often hidden away in a remote corner, conditions, of which the following examples may be given. They have, of course, been gradually elaborated, in view of the successive decisions, so as to close the various loop-holes for actions which have from time to time been found. "The directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delay or detention, unless upon proof that such loss, inconvenience, injury, delay, or detention arose in consequence of the wilful misconduct of the company's servants" (Great Western Railway). "The company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury

which may arise from delays or detention" (Midland Railway). The London and North-Western practically follows the Midland form, which, it will be seen, professes to exclude all liability for unpunctuality. The Great Eastern agrees with the Great Western in leaving to the passenger the shadowy right to damages, if in any case he should perchance be able to show affirmatively, not only that the company's servants wilfully misconducted themselves, but also that such wilful misconduct was the cause of the delay.

Notice of Conditions.—It is now clear law on the decided cases that the concatenation between the "See back" on the ticket and the conditions interred in the time-table is sufficient to amount to notice to the passenger of the terms on which the company contracts to carry him, and that by these terms he is bound. Consequently, cases such as *Le Blanche* v. *London and North-Western Railway* or *Hobbs* v. *London and South-Western Railway*, dealing with the measure of damages in case of delay, seem to have no practical application to the modern state of facts, which may be said to be broadly that a passenger can only obtain a ticket on condition that he contracts himself out of his legal rights to damages for unpunctuality.

United States.—In the United States the Common Law rule is the same as our own—namely, that a carrier of passengers is held, in the absence of special conditions, to have contracted to use all reasonable efforts to carry safely and punctually; and I can find no trace of any attempt on the part of the American railway companies to cut down by special conditions their Common Law liability. For this two reasons may probably be given. In the first place, in the older States the trains run, as a rule, with exemplary punctuality, while in the less settled parts of the country the conditions are such that punctuality is often out of the question; and secondly, the jealousy of the railways is so great that any attempt to curtail the rights of the public would probably be met by the Courts and the Legislatures as would be here an attempt of our companies to limit by notice—which would apparently be equally within their legal rights—their liability for personal injury. Certainly the cases raising the question of punctuality are conspicuous by their absence from American law reports and text-books. But one case is worth citing. In *Gordon* v. *Manchester and Lawrence Railroad* (52 New Hampshire 596) a passenger sued for damages on the ground that a train booked to call at his station ran through without stopping, and that he was consequently late of arriving at Manchester. It was argued on his behalf that the time-table was a contract. The company gave evidence that the train was not stopped, because, being overfilled by a sudden and unforeseen influx at a previous station, there was no room to take up more passengers. In giving judgment for the defendants the Court said:—

"In this country all the railroads publish time-tables, and delays not attributable to negligence are not uncommon; yet suits to recover damages

for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented shows very strongly what has been understood to be the law on the subject."

And not only have the American railway companies not attempted to limit their Common Law liabilities, but in some States additional statutory liabilities have been put upon them.

State Legislation.—In Texas, for instance, the law provides (Revised Statutes of Texas, Title XCIV., Railroads, c. 10) :—

> "Art. 4494 (4226). Every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at the place of starting, and the junction of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of the tolls, freight, or fare legally authorised therefor."
>
> "Art. 4496 (4227). In case of the refusal[1] by such corporation or their agents so to take and transport any passenger or property, or to deliver the same, or either of them, at the regular appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, and in case of the transportation of property, shall in addition pay to such party special damages at the rate of 5 per cent. per month upon the value of the same at the time of shipment for the negligent detention thereof beyond the time reasonably necessary for its transportation; provided, that in all suits against such corporation under this law the burden of proof shall be on such corporations to show that the delay was not negligent."

It may be added that some States—Louisiana and Illinois, for instance—have enacted legislation requiring every railway company within the State to keep at each station having a telegraph office a notice board on which shall be recorded "in hours and minutes" the amount of lateness of any train which is due to arrive.

British North America.—The railway legislation of British North America naturally influences, and is influenced by, the action of its great neighbour. As long ago as 1859 the Province of Canada enacted (Railways, c. 66 of 1859) that

> "The trains shall start and run at regular hours, to be fixed by public notice.

[1] "Refusal" is apparently used in American legal language as meaning "failure without due cause shown."

"The party aggrieved by any neglect or refusal in the premises shall have an action therefore against the company."

Since that date the Province of Quebec (in 1888) and Newfoundland (Consolidated Statutes No. 32, Second Series) have adopted the words given above, adding to them "from which action the company shall not be relieved by any notice, condition, on declaration if the damage arises from any negligence or omission of the company or its servants." Ontario in 1897, and British Columbia in the same year (61 Vict., c. 163), enacted the same law, with the further addition of the words "or misconduct" after "omission." Finally, the Railway Act of the Dominion of Canada (c. 29 of 1888, s. 246) is in the same form as that of Quebec and Newfoundland, as far as paragraph 2 is concerned, but paragraph 1 is modified to read: "All regular trains shall be started and run as near as practicable at regular hours fixed by public notice."

Other Colonies.—With one exception, to be noticed presently, no other colonial Legislature appears to have dealt with the question of railway punctuality. Nor does the Indian Railway Act IX. of 1890 make any mention of the subject. I assume, therefore, that the railways in Australasia and South Africa, which are practically all in Government hands, and also the Indian railways, carry passengers subject to the ordinary Common Law liability.

Trinidad.—The exception is Trinidad, which in the Act No. 6 of 1899 (Railways, s. 32) makes special provision as to the liability of the Government, as owner of railways, to actions for damages in the following words :—

"Every person who sustains loss, damage, or injury by reason of any illegal, negligent, unauthorised, or improper act, omission, neglect, or default of any officer employed upon a railway administered or controlled by the Government of this Colony, or by reason of any breach of contract by any such officer or by the Government, may obtain such damages or other relief as he may be by law entitled by action. . . . Damages . . . shall be paid from the Colonial Treasury."[1]

Germany.—In sharp contrast to Trinidad on the subject of punctuality is the law of the German Empire. The legislation on the subject is contained in the Railway Traffic Regulations (*Eisenbahnverkehrsordnung*), to which the Commercial Code has given statutory force, and which apply to such private railways as still exist, as well as to the State railways, throughout the Empire. The Regulations (III. s. 26) lay down—

(1) That late arrival or departure, or even cancelling of trains, gives no foundation for damages against the railway;

(2) That where a connection is missed, the passenger, if he returns home directly, is entitled to have the fare both ways refunded to him;

[1] For the references to colonial legislation I am indebted to the courtesy of the Librarian of the Colonial Office.

(3) That if an advertised train does not start at all, or only runs part of its journey, a passenger is entitled either to have his fare for the distance not travelled repaid to him, or to be carried forward to his destination by the next train over the same road, or by any other route belonging to the same railway which is not more than 25 per cent. longer, provided that there is room in the train and that it is advertised to stop at the station for which he is booked ;

(4) That if from physical causes or for other reasons traffic over a section of line is interrupted, communication by other means of conveyance is to be established across the gap as far as possible, but that the cost of such conveyance, less deduction for that portion of the railway ticket not used, is to be paid by the passenger to the railway ;

(5) That with the approval of the national authorities and the consent of the Imperial Railway Office, the railway administrations may agree to grant further concessions to the public in this matter ; and

(6) That interruptions of service and delays of trains are to be immediately notified to the public by being posted in an easily accessible place in a clearly recognisable manner.

Austro-Hungary, Denmark, and Switzerland.—The law in Austro-Hungary and in Denmark—in the latter case only as far as lines owned or worked by the State are concerned—is the same as in Germany. The Swiss Law of March 29th, 1893 [Part III., Arts. 59, 60], corresponds in the main with the German law, but it adds a proviso that, if the failure to keep the promise of the time-table results from negligence or gross slackness of service, the passenger is entitled to claim from the railway administration in default damages for resulting injury.[1]

France.—The French law, which applies equally to the State railway and to the lines of the different companies, is in sharp contrast to the law of Germany. Time-tables have to be approved by the Ministry, and when so approved they become binding upon the railway, and form the basis (unalterable by the company or even by agreement between the company and the intending passengers) of the contract of carriage. If the contract is not fulfilled, the passenger has, *ipso facto*, a claim to damages, provided damage is caused, for the mere fact of lateness, without more, is not a ground to recover. Further, the rules as to remoteness of damage seem to be not unlike our own. The responsibility of the railway for punctuality extends to excursion as well as ordinary trains, and notice that a connection cannot be made will not prevent a passenger from recovering damages for the failure to make it. And though a company might successfully plead *force majeure*

[1] This paragraph rests on the high authority of Dr. von der Leyen in the *Zeitschrift für Handelsrecht*, vol. xlix. I have not myself seen the text of the laws.

as justification for not running a train, if it has chosen to issue tickets for that train, it must take the consequences. *Force majeure*, it should be noted, is something wider than "the act of God and the King's enemies," and has been held to include a sudden inrush at all the stations along a line of soldiers returning from furlough. Accidents, however, are not *force majeure.* except they occur without negligence on the part of the company or its servants.[1]

Belgium.—The Belgian law (Titre VII[bis]. of 1891) appears to occupy a position intermediate between France and Germany. Broadly the carrier is responsible for the safe and punctual arrival of passengers unless he can prove that the accident or delay did not arise through his negligence. This responsibility, so far as accidents are concerned, railway administrations are not permitted to limit or reduce ; but they may limit it by regulations having the force of law, and do, in fact, always so limit it, in the matter of punctuality. In effect the regulations provide that the responsibility of the railway for punctuality shall not extend beyond an obligation to repay the price of the ticket, and even this obligation is excluded in the case of excursion, season, and other cheap tickets. In practice I understand that the railway administration repays to passengers at ordinary fares the price of their tickets in all cases of delay not caused by *cas fortuit* or *force majeure.* But the Belgian passenger to whom punctual arrival is of real consequence can at a trifling expense insure himself against loss from unpunctuality, provided he takes the precaution to carry his luggage with him. For baggage is in practice, though not apparently of legal necessity, treated as in the same category as merchandise, in reference to which—by a system common on the Continent—an interest in the delivery (*interêt de livraison*) can be insured at a cost of one-fifth per cent. on the declared value of the interest. A commercial traveller or an actor accordingly, when he sets out to catch a market or give a performance, spends a franc in insurance of his baggage, and if his train is late, not only gets back his fare, but receives £20 as solatium for loss of business. It may be added that, when the Law of 1891 was before the Chamber, several deputies, an ex-Minister of Railways among them, urged that belated passengers should be given rights to damages as extensive as in France, but the Chamber hesitated to expose the State railways to the risk of having to pay the very heavy compensation which might—so said M. Van den Peerboom, the then Minister of Railways—be involved, if at any time traffic was disorganised on the occasion of fêtes or public holidays.

Reflections Suggested by Review of Subject.—Two interesting questions of principle seem to be brought out by this review of the law of the different countries :—

(1) Ought railway administrations to be permitted to limit, either by (*a*) notice or (*b*) special contract in writing, their Common Law liability to their passengers ?

[1] For the French law, see Picard, *Traité des Chemins de Fer*, iv. 208.

(2) Is it in the public interest that the Government, acting as carrier, should expressively assume, as in Trinidad, the ordinary carrier's liability? Or, to put the question the other way round, is the statutory position of our English Post Office, which, while acting as a common carrier on a great scale, is expressly exempted from all legal liability, even for gross negligence, defensible on the grounds of public interest? Or is it not rather a mere survival from pre-democratic days, when the Post Office was avowedly an instrument of royal prerogative, worked with the express object of exacting from the people the revenue of a monopoly?

THE *MASHONA* CASE AND PRIZE JURISDICTION.

[*Contributed by* R. G. Marsden, Esq.]

Constitution of the Court.—The Court which tried the *Mashona* case (reported in this Journal, No. 2, 1900) seems to be the first Prize Court which has sat since the Russian War. Since that time the High Court of Admiralty has been abolished, and several Acts have been passed dealing with the Prize Courts of this country and the Colonies. As usual, they have not left the matter in a very satisfactory state, and they badly need consolidation and amendment. As regards the *Mashona*, the material Acts are the Naval Prize Act, 1864, 27 & 28 Vict., c. 25; the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., c. 57; and the Prize Courts Act, 1894, 57 & 58 Vict., c. 39.

The judgment in the *Mashona* case contains no information as to the constitution of the Court, and no question appears to have been raised as to its competency. Presumably it was a colonial Court of Admiralty, and derived its prize jurisdiction from a Royal Warrant issued, either before the war broke out, under 57 & 58 Vict., c. 39, ss. 2 (1), 3, or afterwards, in accordance with precedents which have been followed for the last two centuries. Under the Act of 1894 the warrant does not take effect until the Vice-Admiral in the Colony has proclaimed that war has broken out between her Majesty and a "foreign State." It would seem, therefore, that the South African Republic is, or was, a foreign State within the meaning of that Act.

Origin of the Jurisdiction.—The history of the prize jurisdiction of the Admiralty is obscure. The distinction which in later times has been drawn between prize and instance jurisdiction did not exist before the middle of the seventeenth century. As early as 1414 an Act was passed requiring all captures to be brought in for adjudication, and similar provisions appear in treaties of 1497 and 1518, and in a proclamation of 1426. It is very doubtful whether these enactments were observed. The records of the Admiralty do not begin until 1520, and formal condemnation of prizes upon proceedings instituted by the captor are not to be found before 1585. After that year, and until the end of the war with Spain, a certain number

of sentences condemning captures as good prize are to be found amongst the general records of the Court; but it is not until the Commonwealth that prize records are clearly distinguishable from instance. Before that date sentences of condemnation appear to have passed only in cases where letters of reprisal had issued, or in cases where the captured ship or goods had been arrested by an owner who claimed against the captor.

"Spoil Causes."—These latter were known as "spoil causes," and of most of them it may be said that they were piracy rather than prize cases. In earlier times the legality of captures was probably decided upon the spot by the Admiral of the fleet to which the captors belonged. A judicial proceeding of this character is mentioned as early as 1357. From the beginning of the thirteenth to nearly the end of the sixteenth century special commissioners were frequently appointed by the Crown to redress spoils committed by English seamen; the Admiralty Court, being dilatory and suspected of partiality, was often objected to by strangers. These are the special commissions spoken of by Lord Mansfield in *Lindo* v. *Rodney*, 2 Douglas 312, *n.* A dictum of the learned judge in that case has sometimes been taken to mean that since the days of Elizabeth the Admiralty Court has always exercised its prize jurisdiction without Royal Warrant. This is altogether contrary to the fact.

Prize Courts in the Colonies.—Prize Courts in the colonies were established upon their present footing towards the end of the seventeenth century. In the early days of our colonial empire, a Crown grant of Admiralty rights appears to have carried power to erect an Admiralty Court in the colony with prize as well as instance jurisdiction. In 1618, under a Crown patent, Sir Samuel Argoll was appointed Governor and Admiral of New England and Virginia, and in 1635 a colonial Vice-Admiral was for the first time appointed for the same Colonies. In 1630 a patent to the Governor and Company of Providence Island, off the coast of Central America, conferred upon the grantees Admiralty rights with power to erect an Admiralty Court. This was interpreted to include a power to adjudicate upon captures, and in 1639 Captain Dell, who commanded one of the company's ships, was instructed to have all captures made by him on the outward voyage adjudicated upon in the island. This Providence is one of England's lost possessions. It was recaptured temporarily by Spain in 1641, and again in 1666. It must not be confused with Providence Island in the Bahamas.

Jamaica.—The most important of the colonial Prize Courts was that of Jamaica. It was established soon after the Restoration, and was adjudicating upon prizes in 1662. It appears to have been erected by the Governor, Lord Windsor, under his patent from the Crown; but a few years afterwards the Duke of York seems to have assumed power to create an Admiralty Court in the island under his patent as Lord High Admiral of England and the Plantations. His first patent of 1660 created him Admiral of England only, and it was not until 1662 that a supplemental

patent issued creating him Admiral of the Plantations. The latter title appears to have been borne for the first time by the Earl of Warwick in 1643.

The Royal Warrant.—Upon the Duke of York's resignation of the office of Lord High Admiral in 1673, under compulsion of the Test Act, the question whether the Commissioners for the Admiralty could, without a Royal Warrant, erect Prize Courts in the plantations and elsewhere became a burning one. A similar question arose upon the appointment of Prince George of Denmark as Lord High Admiral in 1702. Upon both occasions a Royal Warrant was deemed necessary. In 1689 a commission under the Great Seal issued to the Commissioners, empowering them to require the judge of the High Court in England to hear prizes, and in 1694 a Prize Court was erected in Jamaica by a similar commission. Again, in 1702 similar commissions issued to the High Court and to certain colonial Courts of Admiralty; and since that date the same course appears to have been invariably taken upon the commencement of every war. And this has been the case although almost every war has been accompanied by a Prize Act purporting or appearing to give Admiralty Courts jurisdiction in prize.

The Theory of Inherent Jurisdiction.—In the last century the question as to the necessity for a Royal Warrant was raised with reference to the Scottish Court of Admiralty and the Vice-Admiralty Court in Ireland. As to the Scottish Court, there is no doubt that in the seventeenth century it adjudicated upon prizes, and no trace of a Royal Warrant having issued to it has been discovered. The Scottish lawyers always contended that it and other Courts of Admiralty have an inherent jurisdiction in prize; and in 1778 a conflict arose between the High Court of Admiralty of England and the Scottish Court as to their respective jurisdictions in prize. The question was decided by the House of Lords in favour of the English Court, but mainly upon the words of the Statute 16 Geo. III., c. 5, which prohibited trade with the American Colonies. Upon that occasion Lord Mansfield, and in a subsequent case Lord Stowell, expressed strong opinions against the contention that the Scottish or any other Court of Admiralty had an inherent jurisdiction in prize without Royal Warrant. Since that date the matter, both as to the Scottish and the Irish Courts, has been set at rest by Statute; and at the present day it is clear that in the United Kingdom no Court of first instance except the High Court of Justice has any prize jurisdiction. Whether that Court, or whether a colonial Court of Admiralty, or a Vice-Admiralty Court in the Colonies, can without Royal Warrant exercise the jurisdiction is by no means clear.

"LÈSE-MAJESTÉ" IN GERMANY.

[*Contributed by* Ernest J. Schuster, Esq., LL.D. (Munich).]

The prosecutions for *lèse-majesté* which are from time to time reported in the German newspapers are somewhat puzzling to English readers, inasmuch as they deal with an offence unknown to English Criminal Law, and the principles on which they are conducted cannot be properly understood except in connection with the general German law as to the punishment of personal insults.

Personal Insult in Germany.—In *England* an insult is not punishable as such: it may be in the nature of a slander, in which case an action may lie, but criminal proceedings cannot be taken; it may be in the nature of a libel, in which case both civil and criminal proceedings are open to the aggrieved party; and it may also be in the nature of an assault, in which case the Criminal Law offers its aid; but "personal insult" in *the German law* covers a much wider ground than slander, libel, and assault taken together, and is punishable as a criminal offence in all cases.

Any act or omission, or any words spoken or written, or any other manifestation, expressing or implying contempt of another person or a low estimate of his character or reputation, or withholding the proper respect due to him, is punishable as an insult on the complaint of such other person. It is not necessary for that purpose that the act or utterance should take place in the presence of, or come to the knowledge of, any third party; it is sufficient that it should take place in the presence of, or come to the knowledge of, the party to whom it refers.

The maximum punishment in an ordinary case is one year's imprisonment; if, however, the insult is of a defamatory character or is in the nature of an assault, heavier punishments are inflicted according to the circumstances.

Some Instances.—The acts which have been punished as insults by virtue of the above-mentioned provisions are of a manifold kind.

Refusing to shake hands or drawing away one's chair from the table at which the other party is sitting down may constitute a punishable insult under the special circumstances of the case.

Excessive politeness (in the case of a lady) may be an insult as well as excessive rudeness.

The criterion is always whether, according to the reasonable interpretation

of an unprejudiced person, the act in question is deficient in proper respect or liable to expose the party concerned to contempt or ridicule.

Legitimate Criticism.—Literary or artistic criticism and all utterances that are made for the purpose of defending a right or safeguarding a legitimate interest, as well as expressions of disapproval on the part of employers or superior officers in respect of persons subordinated to them, are punishable only in so far as they exceed the proper bounds, and a similar rule is observed in the case of defamatory statements of which the truth can be proved.

"Lèse-Majesté."—It will thus be seen that German law protects, or attempts to protect, every individual, whatever his station may be, against personal insults, and that the special provisions relating to insults directed against German sovereigns (which are generally classed together under the head of *lèse-majesté* [*Majestätsbeleidigung*]) are only of a supplemental nature, and are based on the same principles as those relating to the punishment of ordinary insults.

It is clear that words or actions cannot be judged according to an absolute standard, and that the station in life of the party concerned has to be considered for the purpose of ascertaining their effect. What constitutes pleasant banter between costermongers may be intolerably offensive between persons carrying on more sedentary trades. A cavalry officer may think lightly of an accusation which a clergyman would gravely resent, and *vice versâ*. From this point of view it will also be seen that certain acts or omissions may be an insult to the Sovereign of a State which, if applied to any of his subjects, would be harmless. The law punishes the want of respect due to a person according to his station in life, and the respect due to a Sovereign must of necessity differ in kind as well as in degree from the respect due to other persons. But the principle on which it is ascertained, whether there is an insult or not, is, or ought to be, the same in all cases, and this rule is generally followed by the German Courts.

There are, however, two important features which distinguish prosecutions for *lèse-majesté* from prosecutions for private insults. In the first place, there is a material difference between the punishments respectively awarded in respect of the two classes of offences. In the second place, the mode in which proceedings are initiated in cases of insults directed against German Sovereigns differs substantially from the mode in which prosecutions in respect of private insults are started.

The Quantum of Punishment.—As to the first point, the difference in respect of the minimum punishment is of greater practical importance than the difference between the maximum punishments.

In the case of a private insult the minimum punishment is a small fine, and—except in cases of serious defamation—the personal liberty of the offender is but seldom interfered with by the Courts.

In cases of *lèse-majesté* affecting the German Emperor or the Sovereign of the State in which the offence is committed or of which the offending party is a subject, imprisonment, however, extending over a period of at least two months is the smallest punishment which can be inflicted. If the insult is in the nature of an assault (not being of a serious character) the minimum is five years' imprisonment; whilst in the case of a more serious assault, imprisonment in a fortress for life is the least severe sentence which is admissible.

The maximum punishment in ordinary cases of *lèse-majesté* is five years' imprisonment.

The Mode of Proceeding.—As to the mode of prosecution, private insults are not proceeded against except on the complaint of the aggrieved person, and owing to the fact that but few persons are inclined to bring their private squabbles into general notice, prosecutions for such offences (except in cases of defamation) are comparatively rare.

In the case of insults directed against a German Sovereign, it is, on the other hand, the duty of any public prosecutor to whose notice some contemptuous act committed in his district is brought to institute proceedings forthwith, whether in his personal opinion the prosecution be judicious or not.

Owing to these special features, prosecutions in respect of *lèse-majesté* are much more serious and much more prominent than prosecutions for private insults. This fact in itself is not unnatural, as offences of the last-mentioned description do not injure the community as a whole, whilst, on the other hand, acts or utterances which tend to degrade the position of the Sovereign in the public estimation create a danger to the institutions of the country, and are therefore matters of public concern. True it is that in this country, where the Criminal Law does not take cognisance of the ordinary instances of *lèse-majesté*, acts partaking of the character of that offence are much rarer than in Germany, but the persons who, in criticising the German law on the subject, rely on that fact alone do not sufficiently take into account the differences between the two countries.

The Sovereign's Position in Germany.—In Germany it is not only the right, but also the duty, of the Sovereign to take an active part in the government of his country. In this way his person becomes much more prominent in politics and more exposed to attack. At the same time, the monarchical form of government is much more firmly established in the minds of the people in Great Britain than Germany, where a numerous and powerful political party openly proclaim their preference for Republican institutions. The reasons for interfering with manifestations tending to shake the respect due to the Crown are under these circumstances of a much more pressing nature, and if it could be shown that the means taken to suppress such manifestations were likely to attain the end they have in view, without producing greater evils than those which they are intended to remove, much

might be said for the provisions to which we have referred; but the following considerations will prove that it is extremely difficult to support such a contention.

Objections against Prosecutions for "Lèse-Majesté."—It is a most deplorable but undeniable fact that many of the prosecutions for *lèse-majesté* are brought about by motives of the vilest kind.

A dismissed servant, a treacherous friend, a child smarting under some act of paternal severity, or a faithless wife, may disclose words uttered in the family circle or among intimate associates discussing politics over their beer; some incidental bystander may have noticed some act or utterance disrespectful to the supreme authority in the State, and his fruitless attempts to blackmail may end in a denunciation to the public prosecutor, which the latter must give effect to whether he likes it or not. The injury to public morality which this state of things necessarily produces requires a very powerful set-off, if the legal rules under which it exists are to be justified.

There is also another circumstance which has to be taken into consideration in connection with this problem.

Whenever acts criminally punishable do not shock the moral sense of the people among whom they are committed, persons suffering in respect of the commission of such acts are looked upon as martyrs, and no disgrace whatever attaches to the punishment which they suffer. The most loyal subjects of the Crown cannot view a person who refuses to rise when the King's health is proposed, or who, in criticising some Royal utterance, uses language more forcible than refined, as belonging to the same class as thieves and cardsharpers, and if such a person receives punishment similar to that imposed upon real criminals, his bad manners or coarse utterances are forgotten in view of the exaggerated punishment, and he is apt to receive so much glorification on his departure from prison that the whole incident is subsequently looked upon with pleasure rather than with regret. Many of the deterrent effects of the punishment of *lèse-majesté* are thus neutralised.

Vagueness of the Offence of "Lèse-Majesté."—The somewhat vague definition of the offence to which I have referred gives rise to another regrettable circumstance. The distinction between acts or utterances justified by law and those which are threatened with punishment is of a very subtle and delicate kind, and the Courts who have to administer the law find it very difficult in many cases to come to a conclusion which does not expose them to violent criticism. If they err on the side of severity, they are accused of currying favour with the authorities, upon whom the promotion of the judges to higher appointments depends. If, on the other hand, they acquit the accused in a doubtful case, they are said to be moved by the desire of obtaining cheap popularity with the masses. There is no doubt whatever that such accusations are, in nearly every case, idle calumnies; but the very fact of their existence shakes that confidence in the administration of justice on which the welfare of the community so largely depends.

The facts I have mentioned are, in my opinion, sufficient to show that prosecutions for *lèse-majesté* do not in reality attain the object for which they are instituted, and that the evils which they undoubtedly produce are not sufficiently outweighed by their beneficial effects.

Scurrilous Attacks on British Royal Family: Immunity.—Before, however, concluding my observations I have one more word to say about certain criticisms which have appeared in the English press with reference to the toleration of certain scurrilous and coarse allusions to the British Royal Family by which some low German periodicals have disgraced themselves. The reason of the fact that the editors of these papers have not been prosecuted is extremely simple.

There is a provision in the German Criminal Code relating to the punishment of insults directed against the Sovereigns of foreign States, but it is expressly enacted that the rules in question shall not be applied except in respect of insults against the Sovereigns of such States as have penal laws similarly imposing punishments in the case of insults directed against German Sovereigns. As no such laws exist in England, it would have been quite impossible to punish the offenders in the cases to which we have referred, and complaints on the subject are, therefore, entirely groundless.

General Conclusion.—Speaking generally, it may be said that the dignity of the Crown does not suffer by coarse jests and silly caricatures, and that if people cannot be made moral by Act of Parliament, it is still less feasible to teach them good manners and refinement by the aid of penal enactments.

THE INFLUENCE OF ENGLISH LAW AND LEGISLATION UPON THE NATIVE LAWS OF INDIA.

[*Contributed by* Sir W. H. Rattigan, K.C.]

General Policy of the British Government in India.—The policy which has steadily been pursued by the British Paramount Power in India ever since it acquired sovereign rights in that country is that which was set forth in Warren Hastings's plan of 1772. In paragraph 23 of that remarkable document it was laid down that "in all suits regarding marriage, inheritance, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mohammedans, and those of the Shaster with respect to Gentus, shall be invariably adhered to."

The policy thus wisely enunciated by the great administrator was solemnly re-affirmed by the first legislative enactment which was passed by the Governor-General in Council under the authority of a British Act of Parliament, commonly known as the Regulating Act of 1773. The enactment in question was passed in 1780, and the exact words of Warren Hastings's plan were incorporated in s. 27. They were again repeated in the revised Bengal Code of 1781, and in the still later Regulation of 1787, with a proviso "that in cases of succession to *zemindaris*, *talukdaris*, and *chowdhris*, the judge do also ascertain whether they have been regulated by any general usage of the *pargana* where the disputed land is situated, or by any particular usage of the family suing, and do consider in his decision the weight due to the evidence on this head." Although this particular proviso was not retained in the revised Regulations of 1793, passed in the time of Lord Cornwallis, which (in s. 15) simply reproduced the provisions of the earlier Regulation of 1780 with the addition of the word "succession," introduced by the Regulation of 1781, the proviso is interesting to the student of Comparative Legislation as the first formal sanction given in India under British administration to local and family customs. The true position of custom under the native written laws will be considered presently; but it may be pointed out here that later legislation has placed custom in the Punjab (s. 5, Act IV. of 1872 as amended), Madras (s. 16, Act III. of 1873), Central Provinces (s. 5,

Act XX. of 1875), Oudh (s. 3, Act XVIII. of 1876) and in Bombay (s. 26 of Bombay Regulation IV. of 1827) on a statutory footing. It is only necessary to add that the Regulation IV. of 1793 was repealed by Act VI. of 1871, which in its turn has been repealed by Act XII. of 1887, which is applicable to Bengal, Assam, and the North-West Provinces, and contains no reference to custom.

The above Regulations of 1780, 1781, 1787, and 1793 were only intended to regulate proceedings in the East India Company's Courts in the Bengal Presidency. The town of Calcutta, however, had been brought under the civil and criminal jurisdiction of the Supreme Court, established by the Crown in 1774 under the authority of the Regulating Act of 1773. But neither this Act of the Imperial Parliament—"with a carelessness," says Macaulay, "common in English legislation"—nor the Royal Charter which constituted the Supreme Court prescribed the law which was to govern the Court in the exercise of its ample jurisdiction. There were other defects and omissions in the Regulating Act which led to serious conflict between the Governor-General in Council on the one hand and the Supreme Court on the other, which, although possessing only a purely historical interest for the present generation, threatened at the time to paralyse the effective administration of the country, and to produce "a reign of terror, heightened by mystery." Warren Hastings saw the danger of conflicting jurisdictions and realised the necessity of introducing some sort of fusion between the Sadr Diwani Adalat, established to supervise the control of the Company's Courts, and the Supreme Court; and in order to remove one source of friction he adopted, no doubt in perfect good faith, the expedient of appointing Sir Elijah Impey, then Chief Justice of the Supreme Court, to exercise the additional office of President of the Sadr Court on a large supplementary salary. His motives, honest but mistaken, were misinterpreted, and without entering into the merits or demerits of the heated controversy which arose out of Hastings's action, it must at least be admitted that his expedient of restoring harmony was open to grave objections. The two positions which Sir Elijah Impey was now called upon to occupy were not compatible, and his duty and his pecuniary interest were liable at any moment to be brought into irreconcilable conflict. The Court of Directors in 1782 cancelled the subsidiary appointment, which Macaulay has characterised as the giving and taking of a bribe which enabled the Chief Justice to become "rich, quiet, and infamous." Meantime, the conflicts which had previously arisen brought about the passing of 21 Geo. III., c. 70, in 1781, better known as the Declatory Act. By s. 17 of this Statute it was enacted, with regard to the native inhabitants of Calcutta, that "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mohammedans by the laws and usages of Mohammedans, and in the case of Gentus by the laws and usages of Gentus; and when one of the parties shall be a Mohammedan or Gentu, by the laws

or usages of the defendant."[1] In order, moreover, that regard should be had to the civil and religious usages of the said natives, the Statute went on to provide that rights and authorities of the fathers and masters of families, according as the same might have been exercised by the Gentu or Mohammedan law, were to be preserved to them within their families, nor was any act done in consequence of the rule and law of caste respecting the members of the said families only to be held and adjudged a crime, although it might not be held justifiable by the laws of England.

It will thus be seen that the last-mentioned Act of Parliament secured to the native population of Calcutta the benefit of their own personal laws to a greater extent than their co-religionists enjoyed under the Bengal regulations in the Mofussil. The Supreme Courts and the Sadr Diwani Adalats were abolished when the High Courts of Calcutta, Madras, and Bombay were established under the operation of the High Courts Act, 1861. The fusion which Warren Hastings partially attempted to accomplish for Bengal in 1780 was thus effectively carried out on a more complete and extensive scale eighty-one years afterwards. By the charters constituting the various High Courts it was ordained that the law or equity to be applied to each case was to be, *until otherwise provided*, the law or equity which would have been applied by the Supreme Court. It follows that in matters of succession, inheritance, *and contract* the Hindus and Mohammedans of the Presidency towns still continue to be governed by their own laws, *until otherwise provided.*

History of Legislation.—The history of legislation in regard to the above matters in the Madras and Bombay Presidencies runs very much on the same lines as we have just traced in regard to Bengal.

On the Madras side, Regulation III. of 1802, enacted under the provisions of 39 & 40 Geo. III., c. 79 (of the year 1800), followed the wording of the Bengal Code in regard to the application of the native laws. But the inhabitants of the towns of Madras and Bombay had the benefit of their laws extended to them in 1799 under the operation of 37 Geo. III., c. 142, which allowed the creation of Recorder's Courts in Madras and Bombay. S. 13 of this Act was in the same terms as s. 17 of the Declaratory Act already quoted. The Supreme Court was created for Madras by Royal

[1] The language of this section is not, it must be confessed, as plain as one might wish, and an attempt was made in a case decided by the High Court of Bengal in 1881 to apply the concluding words of the section to a suit where the widow of an Armenian sued the purchasers of her husband's property, who were Hindus, for dower. It was contended that as the defendants were Hindus and the Hindu law did not recognise a claim for dower, the suit was not maintainable. But the High Court rightly overruled the contention, holding that "the true construction of the section must confine the words 'their right and succession' to questions relating to inheritance and succession by the defendants." "The present," said Mr. Justice Pontifex, "is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentus" (*Sarkies* v. *Prosono Moyee Dossee*, I.L.R. 6 Cal. 794).

Charter (December 1801) under 40 Geo. III., c. 79, but s. 22 repeated the provisions of the Act of 1799, which it repealed.

Bombay did not obtain a Supreme Court until the year 1823, and the Act which authorised the creation of this Court (4 Geo. IV., c. 71) contained, in s. 29, the same provision as regards the application of native laws as the preceding enactments.

Changes effected in the Criminal Law.—The above retrospect of the early legislation concerning the administration of justice by British Courts sufficiently proves how earnestly the British Government strove to preserve to the natives of India the exercise of their own personal laws. But with the best intentions on the part of Government to disturb existing institutions and usages as little as possible, the influence of progress and civilisation, under the administration of officers imbued with the principles of western ideas, could not but serve to introduce innovations and modifications into the system we found in vogue when the British first assumed the direct government of the country. That system was more or less on the lines laid down by the great Akbar, according to which, in civil cases, Brahmins were employed to expound the law in disputes between Hindus, and Moulirs in the case of disputes between Mohammedans. In criminal matters the Mohammedan Penal Law was enforced as the general law of the land, applicable alike to Hindus and Mohammedans, for some years by native officers under the control of the Nawab Nazim, and since 1790 by circuit Courts, reconstituted in 1793 as stationary Courts, under the presidency of a civil servant of the East India Company as judge, with the assistance of two Mohammedan lawyers (a *Qazi* and a *Mufti*) as assessors.

It was the duty of the latter to expound the law applicable, and if the judge considered this pronouncement, or *fatwa*, to be consonant to natural justice, he passed sentence accordingly; but if he thought otherwise, the proceedings had to be referred to the Court of Appeal. If this Court found the *fatwa* to be in accordance with Mohammedan law, but contrary to natural justice, it was still bound to give effect to the same, *if it was in favour of the prisoner*, but if it was *against* him, the Court had to recommend a pardon or a mitigation of the sentence, and to suggest a new regulation to prevent the recurrence of similar injustice. Gradually, under this saving provision, the harshness of the Mohammedan Criminal Law was contracted. Thus, up to 1791, mutilation, prohibited by Akbar, was permitted under a sentence of the native Foujdari Adalat, and the *Calcutta Chronicle* of 1789, quoted in *Echoes of Old Calcutta* (p. 138), gives a terrible account of such a sentence being carried out in the case of a gang of fourteen dacoits. But in 1791 imprisonment with hard labour was substituted for mutilation. It was not till the following year (1792) that prosecutions for murder ceased to depend on the concurrence of the murdered man's relatives. Nine years later witnessed another change, whereby the older rule that a person who intended to kill A. but accidentally killed B. instead was not liable to

capital punishment was abrogated. The murder of a paramour in the act of fornication with the mistress or other female relation of the prisoner was recognised up to 1820 as justifiable homicide, but this plea was declared in 1822 to be no bar to capital punishment. Even the rules of the Mohammedan law of evidence were at first respected to an extent which must have often caused a gross miscarriage of justice. Thus it was not until 1835 that the Sadr Court refused to recognise a *fatwa* to the effect that a prisoner could not be convicted on the evidence of a minor female; and the rule excluding the testimony of non-Mohammedans against Mohammedans could only be set aside by the Appellate Court on a reference by the original Court, accompanied by a *fatwa* from the law officers setting forth what would have been their decision had the witnesses been Mohammedan.

For sixty years the Mohammedan Penal Law in a modified, if not distorted, form continued to be employed as the general Criminal Law of the land; but in 1832 it was enacted that it should no longer be enforced against non-Mohammedans for the punishment of offences cognisable under the Regulations. It required another thirty years before the last vestige of this law, so completely out of harmony with the juridical notions of an enlightened age, was removed from the cognisance of British Courts. It had been tinkered at, modified, gradually repealed, and not infrequently deliberately ignored where its provisions were such as no civilised government could be expected to enforce, until, as pointed out by the framers of the Indian Penal Code, in substance the law as administered differed as widely from the Mohammedan Penal Law as the Penal Law of England from that of France. But it was not until 1862 that the Penal Code —framed in 1838 by the Indian Law Commissioners and passed in 1860, but which only came into operation from January 1st, 1862—finally gave the substantive Criminal Law for India, and superseded the pre-existing patchwork system borrowed largely from the Mohammedan law.

Course of Legislation in Civil Matters.—In regard to civil matters there has not been, it is true, such a complete revolution in the juridical system of the country; but even in this department of administration the influence of English jurisprudence, of English legislation, and of English methods of interpretation of doubtful texts of the original native laws, has been growingly increasing. In the first place there were several branches of Civil Law which had no connection with those religious usages and institutions which it was the declared policy of the British Government not to meddle with. In dealing with cases falling within what I may call this outer range of civil jurisprudence, the Courts for a long period had no other guide than what was furnished by the broad rule of deciding according to "Justice, equity, and good conscience." To judges and lawyers trained to regard English law as the outcome of the highest wisdom, the only measure of justice, equity, and good conscience which commended itself to their minds was that which was to be derived from the Common Law of their own

country. A body of native lawyers also gradually came into existence who had been trained in the same school, and who naturally acquired the same legal notions as their English *confrères*. But while the Common Law of England undoubtedly afforded a rich source of supply of legal principles, it was nevertheless a source the knowledge of which was necessarily confined to a very limited body of experts. To the large mass of the population, and to most of the subordinate Courts of First Instance, the source was obviously beyond their intellectual reach. Uncertainty, confusion, and conflict of decision were the necessary consequences, and every day's additional experience confirmed the need of supplying the people and the Courts with a more definite statement of the law in regard to those general matters which affected the transactions of ordinary social life. A written law, clear and definite in its terms, and simple in its language, was therefore called for, and legislation was required to give it the proper sanction. In England there was a prejudice against codification and a strange fascination for that undigested and unclassified mass of case law which was reported in something like six hundred volumes, which no living lawyer could claim to have even read, much less to have mastered, and of which no human memory could possibly retain any familiar knowledge within the cells of a single brain. "I cannot conceive," said one distinguished opponent[1] of even the codification of the Criminal Law, "that language can ever be used with such precision as to meet all complications and varieties of circumstances. If you are very definite in your law, you will very often find something in the case which distinguishes it. If you are very general, you run the risk of including many things which clearly were not intended." "To reduce," said another,[2] "unwritten law to statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible adaptation."

Codification of Certain Branches of Civil Law.—Happily in India arguments of this kind were not permitted to interfere with the attempt to codify particular branches of the law, and experience there had not shown that "rules capable of flexible adaptation" were altogether an unmixed blessing for a people conditioned like the native races of India. A bold attempt was accordingly made to codify that very branch of law—*i.e.*, the Criminal Law—which English lawyers considered to be incapable of such treatment. The famous draft of a Penal Code which had been framed by the Indian Law Commissioners (appointed under the Charter Act of 1833), under the guiding hand of Macaulay, was unearthed, revised, and passed into law. Its value was soon felt, and magistrates and the higher judges who had to administer the Criminal Law, had their labours minimised in ascertaining whether a given act was within its provisions or not. The great success

[1] Mr. Justice Coleridge, quoted in Mr. James C. Carter's pamphlet on *Proposed Codification of our Common Law*, at p. 77.

[2] Mr. Justice Talfourd, *ibid.*

which attended this first attempt at codification on any large scale in India naturally induced other efforts in the same direction with reference to other parts of the law.

The Indian Succession Act (X. of 1865), the Hindu Wills Act (XXI. of 1870), the Evidence Act (I. of 1872), the Contract Act (X. of 1872), and the Specific Relief Act (I. of 1877), as well as the Civil and Criminal Procedure Codes, may be specially mentioned in this connection. These enactments were followed in 1881–82 by a further instalment of codification dealing with

(1) The law relating to promissory notes, bills of exchange, and cheques (Act XXVI. of 1881);
(2) The law relating to private trusts and trustees (Act II. of 1882);
(3) The law relating to the transfer of property by act of parties (Act IV. of 1882);
(4) The law relating to easements and licences (Act V. of 1882).

Some of these enactments, like the Evidence Act and the Contract Act, extend to the whole of British India, while others, like the Trusts Act and the Transfer of Property Act, only apply to certain specified provinces. Wherever the provisions of these Acts apply, they supersede (unless where it is otherwise expressly declared, as in s. 2 of the Trusts Act and s. 2 of the Transfer of Property Act) all pre-existing laws. The British Indian Legislature has, therefore, freely availed itself of its supreme power to define what shall henceforth be the law of the land in regard to a large part of the civil rights of the population of India which do not affect religious usages or institutions, as to which interference has been avoided as far as possible, in accordance with the declared policy of the Government. But in some instances the Government has been obliged to go further and to abolish customs which, although sanctioned by ancient usage and clothed with the sanctity of religious precepts, were either contrary to the principles of enlightened government and inflicted injury or disability upon others, or which, in the opinion of many learned natives themselves, could not be supported by any proper interpretation of the sacred law.

In this class of legislation may be mentioned the measures adopted in 1829 for the suppression of *Sati* and in 1843 for the emancipation of domestic slaves. Another instance of similar legislation is that furnished by Act XV. of 1856, legalising the re-marriage of Hindu widows. Here, again, the custom which imputed incapacity to a Hindu widow to contract a second marriage was an old one, and, if such marriages were not directly prohibited by the Shastras, they were at all events condemned, with the view, perhaps, of preventing the observance of the system of *Nyoga*, or appointment to raise issue on the widow of a deceased brother. On the other hand the custom was opposed to a large body of enlightened public opinion amongst Hindus themselves, and it was urged that the removal of all legal obstacles to the marriage of Hindu widows would tend to the

promotion of good morals and to the public welfare. These arguments prevailed with the Government, and Act XV. of 1856, accordingly enacted (s. 1) that "no marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, *any custom and any interpretation of Hindu law to the contrary notwithstanding*."

Again, it must be remembered that the object of the early regulations was to secure to Hindus and Mohammedans the exercise of their rights in accordance with their own personal laws. But they did not contemplate that these laws should be resorted to for the purpose of working a forfeiture of any existing rights or property. It was accordingly enacted by Regulation VII. of 1832, s. 9 of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mohammedan persuasion, or when one or more of the parties to the suit shall not be either of the Mohammedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled." By the *Lex Loci* Act (XXI. of 1850) the principles of this Regulation were still further extended by declaring that "so much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories." Upon the construction of this Act it has been held by the High Court, North-West Provinces, that it protects the sons of converts and degraded persons (*Bhagwant Singh* v. *Kallu* [1888], I.L.R. 11 All. 100). But the reasoning by which this judgment is supported is not very convincing, while the language of the Act itself is plainly restricted to existing rights of the convert or outcast himself. The correctness of the decision has been doubted by the Punjab Chief Court in No. 82 P.R. 1890, but approved of in an unpublished ruling, No. 1413 of 1890. See also No. 63 P.R. 1895.

Law Governing Contracts in Presidency Towns.—The extent to which the Hindu and Mohammedan laws applicable to the native population of British India have been recognised, modified, or abrogated by means of express legislation under British rule has been sufficiently indicated. But before leaving this branch of the subject it may not be devoid of interest to point out that in the Presidency towns of Calcutta, Madras, and Bombay the law of contracts at the present day, is partly governed by the provisions of Act IX. of 1872 (the Indian Contract Act) and partly by the native

laws applicable to the particular case, with reference to the provisions of s. 17 of 21 Geo. III., c. 70, the wording of which was substantially maintained in s. 22 of 40 Geo. III., c. 79 (for Madras) and s. 29 of 4 Geo IV., c. 71 (for Bombay). Under these Statutes, as we have seen, the Supreme Courts were bound to administer the laws and usages of Mohammedans and Hindus, not only with respect to questions of inheritance and succession, but also (and here the Statutes go beyond the Regulations applicable to the Mofussil) with respect to matters of contract and dealing between party and party. The charters establishing High Courts in the Presidencies named did not define the law which these Courts were to administer, beyond ordaining that "the law or equity to be applied to each case shall, *until otherwise provided*, be the law and equity which would have been applied by the Supreme Court." Cases, therefore, between Mohammedans and Hindus brought before the High Courts in the exercise of their original civil jurisdiction in respect to any matter of contract will still be governed by the Hindu or Mohammedan law, as the case may be, so far as the Legislature has *not otherwise provided*. The Indian Contract Act, for instance, extends to the *whole* of India, and consequently applies to the Presidency towns. It follows that where its provisions are applicable they, and they alone, must be enforced by the High Courts (*Madhub Chandra Poramanick* v. *Raj Coomar Das* [1874], 22 W.R. 370, at pp. 374, 375). But where any incident of any contract is not expressly governed by the Contract Act and is not inconsistent with the provisions of the Act, the Hindu and Mohammedan law applicable to the particular case must govern it. It is thus that the Hindu law of Dámdupat, which does not prevail in the Mofussil (*Het Narain Singh* v. *Ram Deen Singh* [1883], I.L.R. 9 Cal. 871), and under which arrears of interest cannot be recovered beyond double the principal, is still enforced on the original side of the High Court (*Nobin Chander Bannerjee* v. *Romesh Chander Ghose* [1887], I.L.R. 14 Cal. 781). On the other hand, it has been ruled that in regard to a gift of immovable property in Calcutta, even if the Hindu law required delivery of possession, that law must be held to have been abrogated by the terms of the second paragraph of s. 123 of the Transfer of Property Act above referred to, which must be construed to mean that a gift of immovable property can be *only* effected by the execution of a registered instrument, nothing more being necessary (*Dharmodas Das* v. *Nistarini Dasi* [1887], I.L.R. 14 Cal. 446, which seems to have been approved of in a later case [1892] reported in vol. xx. of the same reports, at p. 464).

Effect of Judiciary Law upon the Native Laws.—We may now pass to the consideration of the question how far the native laws have been indirectly affected by the course of judicial decisions in British Courts and by the application of English rules of interpretation of original texts.

Mode of Dealing with Native Laws.—The duty of a European judge

who is under the obligation to administer Hindu law was defined by their lordships of the Privy Council in the case of *The Collector of Madura* v. *Motoo Ram Linga Satapaty* (1868, 12 Moore's Ind. App. 397, at p. 436) as "not so much to enquire whether a disputed doctrine is fairly deducible from the authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has therefore been sanctioned by usage."[1] The dictum, however, is not very lucidly expressed, and has also been criticised by Dr. Jogendranath Bhattacharji[2] as giving too great prominence to custom, which has "nothing to justify it beyond Sir W. Jones's erroneous translation of the texts in which the word *achara* occurs in Manu's Code." According to this writer, the word "means, not custom, but what may be called adjective law with reference to the performance of religious duties." In the popular sense, however, it is admitted that *achara* may be taken as equivalent to custom, and particularly in Manu viii. 41 and 46. In Manu ii. 6, 12, and 18, and iv. 155 and 158, it is also rendered "custom" by Burnell. Kalluka's commentary on Manu viii. 41, that the laws or usages of districts (literally "country-folks") *if not opposed to the law given by tradition—i.e.*, of express texts—are binding as law, is of course founded on the text of Gautuma, which, as translated by Georg Bühler,[3] runs thus: "The laws of countries, castes, and families, which are not opposed to the (sacred) records, (have) also authority." This text may perhaps create a difficulty in attributing to custom an overriding power even with respect to mandatory injunctions in provinces in which the Legislature has not given it a recognised sanction. But in other provinces where such a sanction has been given, examples of which have already been mentioned, custom must be regarded as "transcendant law."

European Judges and the Teachings of the Bengal School.—It should be also observed that while the duty inculcated by the Privy Council is on the whole correct enough, the early British administrators of Hindu law were so strongly imbued with the peculiar teachings of the Bengal school, with which they were most familiar, that they were too readily inclined to draw analogies from authorities of that school in the interpretation of laws prevailing in other schools. It is well known that the prevailing authority in the Bengal school is the work of Jímúta-váhana, whose notion of individual

[1] This dictum has led to an extraordinary error on the part of the Allahabad High Court which has involved another appeal to the Privy Council to set it right. It was construed as meaning that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. This would have been to invert the processes by which law is ascertained, and was clearly not intended to be laid down by the Privy Council. See, as to the right interpretation of this dictum, *Bhagwan Singh* v. *Bhagwan Singh* (1899), L.R. 26, Ind. App., at p. 164.

[2] *Commentaries on the Hindu Law*, 2nd ed. p. 50.

[3] *Sacred Laws of the Aryas*, ii. 234, Gautuma, ix. 20.

proprietary right is best in accord with that of English lawyers, and, we may add, with the trend of educated native opinion. But Jimúta-váhana's doctrine is not consistent with the doctrine of those schools where the Mitacshara law prevails. Indirectly, however, the tendency of British Courts to favour an absolute right of ownership has had its effect in producing decisions which can scarcely be reconciled with the true theory of a joint Hindu family. It is upon that theory that no member of a joint family can assert an individual right of property in any specific portion of the joint estate, and it is also upon that theory that the obligation of the co-sharers to maintain their female dependent relatives is founded.

Hindu Widow's Claim to Maintenance.—Thus a widow's claim to maintenance out of the joint property in which the deceased husband had an interest was held in some earlier cases to override all other rights, including even those of a purchaser from the survivors to whom the husband's interest had lapsed.[1] But later decisions[2] have engrafted a qualification on the widow's right to have such a charge imposed in favour of a *bonâ-fide* purchaser without notice. It is also to be noted that the British Indian Legislature has likewise adopted this doctrine in s. 39 of the Transfer of Property Act. It cannot be doubted that the older view of the law was more in accordance with the intention of the ancient sages and commentators by whom the Hindu law was propounded ; but on the other hand it must be remembered that Hindu society has not remained stationary while everything around has experienced the conditions of change and progress. The Hindu female may still be a lady who is compelled to a life of seclusion, who knows nothing of what is going on in the outer world, and who is consequently at the mercy of her male relatives. It may at first sight appear a hardship to her to prevent her from following family property in the hands of a *bonâ-fide* purchaser, for it may happen that there is no other source from which she can recover her maintenance, while the rigid rule of seclusion to which she is subject would prevent her from seeking an independent livelihood. The Courts cannot, however, be expected to shut their eyes to the fact that transfers of immovable property have become far more frequent, and that with the undoubted power to make such transfers on the part of the male members of a family other equities have come into existence which equally demand protection. As pointed out by the High Court, North-West Provinces, the principle of protecting a *bonâ-fide* purchaser without notice cannot be objected to as being something peculiar to English law, as it rests on grounds of public convenience which are of universal application.[3] Again, when this principle was once admitted, it was only a step forward to declare that when a sale of family property is effected for a purpose which is recognised

[1] Cf. *Heeralal* v. *Musst. Konsillah*, 2 Agra, N.W.P. Reps., p. 42; 15 W.R. 263; 7 Mad. H.C.R. 226; Mad. Dec. for 1860, p. 230; and W.R. for 1864, p. 310.

[2] I.L.R. 4, at p. 299.

[3] I.L.R. 4, at p. 299.

as a legal necessity (which includes a family debt contracted by the head of the family), the claim for maintenance on the part of a female member cannot claim precedence, even if the purchaser had notice of the existence of females and of their claim to maintenance (see *Lakshman Ramchandra Joshi* v. *Satyabhanna Bai* [1877], I.L.R. 2 Bom. 494; and *Natchiaram* v. *Gopala Krishna* [1878], I.L.R. 2 Mad. 126). The payment of family debts, in fact, is made to take precedence of any right of maintenance. The Hindu widow is thus placed in an inferior position, as regards her claim to maintenance, to a Mohammedan woman in regard to her claim for dower, for in the latter case the claim is held to have priority over all unsecured debts, while it would rank *pari passu* with secured ones.

Of her Duty to Reside in Husband's House.—The allied question whether a Hindu widow's right of maintenance is dependent upon her residing under the protection of her husband's family affords another instance where the decisions of British Courts have materially departed from the strictness of the ancient law of the Rishis by the introduction of more liberal principles borrowed from their own more enlightened jurisprudence. To the orthodox Hindu, still reverently obedient to the precepts of his holy sages, the text of Katyáyana, quoted by Jimúta-váhana in the *Dazabhaga* (chap. ii., s. 1, ver. 56), with his own explanation in verse 57, coupled with the text of Narada quoted in verse 64, undoubtedly imposes the duty upon a widow of residing in her deceased husband's house, where he has left one, and under the control of his family. A dereliction from this duty would be regarded by a pious Hindu as amounting to nothing short of misconduct on the part of the widow. But a Hindu sage, and no less a one than Vrihaspati himself, has taught us that "a decision must not be made by having recourse to the letter of written codes, since, if no decision were made according to the reason of the law, there might be a failure of justice." Now the reason of the law in requiring the widow to continue her residence in the house of her deceased husband was to ensure her chastity; and British Courts have naturally held that a widow will not forfeit her right to maintenance out of property chargeable therewith merely by reason of non-residence with the family of her deceased husband, except when such non-residence was for unchaste or immoral purposes. To have held otherwise would have been to cause a failure of justice out of a slavish deference to the letter of the sacred texts. A modest and virtuous Hindu woman would naturally be averse to leave her deceased husband's home, contrary to the general usage of the country, unless she was compelled to take such a course in consequence of ill-treatment on the part of her husband's relatives. To deprive her also, under these circumstances, of her right to maintenance would be to encourage the husband's relatives to force her either to relieve them of their liability to support her or to submit to a life of misery and daily annoyance—an alternative which it would be grossly unjust to impose upon her.

Introduction of Wills amongst Hindus.—The introduction of wills

amongst Hindus is also attributed to the influence which the example of Englishmen had upon the native mind. The first Hindu will of which we have any specific knowledge is that of the famous Ami Chand, or Omichand, of Lord Clive fame, which bore the date 1758, and probate of which was granted by the Mayor's Court in August 1771 (see *Doe Dem Heera Singh* v. *Bolaku Singh*, Montriou's Cases, at p. 333). Another early instance is that of one Gunga Bissen which was dated 1st Bysack of the Bengali year 1186, and which was declared a valid instrument by the Supreme Court in August 1786 (*ibid.*, pp. 290–295). The Hindu law certainly does not expressly recognise testamentary dispositions, and the germs of such a recognition as are supposed to be traceable in texts of Katyáyana and Harita, which render certain promises of gifts for religious purposes or by a father obligatory on the donor, do not appear to be capable of such an interpretation. It is possible, therefore, that the Hindus at Calcutta adopted the practice in the first instance from the English residents, but it is surely equally possible that the example may have been furnished to them by their Mohammedan conquerors, for wills are well known to the law of the Shara. In Southern India greater resistance to the introduction of wills amongst the Hindu population, both by the Courts as well as by the local Legislature, was shown than in other provinces. Madras Regulation V. of 1829 was an authoritative pronouncement that wills were unknown to Hindu law, and it directed the Company's judges to give no legal force whatever to them, except so far as they were proved to be in conformity with the authorities prevailing in that Presidency. Acting upon this pronouncement, the Madras Sadr Court set aside numerous wills, either where they prejudiced the heirs by an unequal distribution (see Mad. Dec. for 1849, p. 27) or bequeathed the property away from the widow and daughters (Mad. Dec. for 1850, p. 50). Indeed, so strong was the attitude of the Courts against sanctioning a testamentary power in the case of Hindus, that even after the Privy Council had affirmed the operation of a will in a Madras case, with reference, however, to the circumstances of the testator's family, and without laying down any broad proposition of law, the Sadr Court (in 1861) refused to act upon this decision. The question was at length settled for the Madras Presidency by the decision of the High Court in *Valinayagam* v. *Pachechi* (1863), 1 Mad. H.C. Reps. 326. On the Bombay side the same disinclination to admit a testamentary disposition has been shown, but there also with the final result that it is now clearly established in respect to whatever belonged to the testator as his absolute property (*Bhagvan Dullabh* v. *Kala Shankar* [1877], I.L.R. 1 Bom. 641). In short, in this controversy concerning the validity of a Hindu will we find abundant evidence of another early tendency on the part of Courts in India, presided over by European judges, of adhering rigidly to the express provisions of the Hindu Shastras, and admitting nothing except what could be supported by the distinct

authority of the sacred law. But by degrees the necessity of keeping in view the altered conditions of Hindu society, and of supplementing the texts of the sacred law, where they are silent as to a particular point, with reference to actual usage have brought the decisions of our Courts into greater harmony with the trend of public opinion.

Moral and Legal Obligations Distinguished.—The same consideration has brought about the ingenious device of distinguishing texts which merely inculcate what may be called moral duties from others which are said to prescribe legal obligations. The former are regarded as being merely recommendatory (*arthavada*) in character, appealing to the sentiment of the more strictly orthodox, and being productive of religious merit, while the latter are interpreted as mandatory, and consequently imperative. Sanscrit lawyers call the former *Kamya* and the latter *Nitya*. Thus it is that the injunctions against the adoption of an eldest or an only son which are found in the sacred law, but which in practice are more frequently contravened than honoured by observance, have been relegated to the category of purely recommendatory texts which form

> A limbo large and broad, since called
> The paradise of fools.

On the other hand, in deference to a steady current of authority extending over eighty years, the Privy Council, reversing a Full Bench decision of the Allahabad High Court, has declared the adoption of a daughter's or a sister's son invalid amongst the three regenerate classes of Hindus (L.R. 26 Ind. App. 153). By this mode of interpretation inconvenient conflicts between the written and the unwritten law, sanctioned by prevailing usage, are got rid of without offending native prejudice, and the obsolete provisions of an ancient law are not allowed to interfere with the natural development of a progressive society.

Effect of Judiciary Law upon the Mohammedan Law.—Turning to decisions relating to Mohammedan law, the intimate connection between law and religion in that system, even more pronounced than in the Hindu system of law, has rendered the task of exposition still more difficult for an English judge. Nowhere has this circumstance induced a greater conflict of judicial opinion than in regard to the vexed question whether, under Mohammedan law, a gift to the donor's descendants without any mention, or a mere illusory mention, of the poor could be supported as a *wakf*.

(*a*) *In Regard to "Wakf."*—From the point of view of lawyers trained in the school of European jurisprudence it seemed anomalous that while the Mohammedan law refused to recognise simple gifts by a private person to remote unborn generations of descendants, it should nevertheless be asserted, upon the strength of abstract precepts, which seemed to them extravagant, taken from the mouth of the Prophet, that the very same

dispositions become legal if only the settler says that they are made as *wakf*, in the name of God, or for the sake of the poor. To uphold this contention naturally appeared to the minds of English lawyers to "make words of more regard than things, and form more than substance." These difficulties presented themselves to their lordships of the Privy Council in the now famous case of *Abul Fata Mahomed Ishak* v. *Russamoy Dhur Chowdry* (1894), L.R. 22 Ind. App., at pp. 87, 88. The design of such a religious bequest was regarded as being nothing short of a perpetuity in the family of the donor, and such a design is always abhorrent to an English lawyer, and is not even favoured by a Mohammedan. But when we come to view the question from a purely Mohammedan standpoint, the above arguments, cogent and convincing enough to European minds, must be brushed aside as of no weight in comparison with the respect that is due to the original authorities which are cited in support of a contrary doctrine. A *wakf* is essentially a perpetuity, and it is this very element which gives it the irrevocable character it possesses by Mohammedan law. It is an institution which is clothed with the highest sanction—that of the Prophet himself and the practice of his companions; and no Mohammedan will refuse to yield obedience to any precept which is accepted by a consensus of authorities as having emanated from the mouth of Mohammed. To reject such a precept on the ground that it is extravagant or purely abstract in character is never likely to meet with approval on the part of the Mohammedan community, and is, on the contrary, certain to arouse a feeling of irritation and opposition. Now as regards a gift to the donor's descendants there is an accepted tradition that the Prophet once said that "a provision for one's self is tantamount to an act of charity," which is analogous to our own homely phrase that "Charity begins at home." It may not be "charity" in the sense of English law, but that is beside the question when dealing with a Mohammedan gift. The Prophet has pronounced it *sadakah*, and according to the most reputed Mohammedan doctors the term *sadakah* conveys the meaning of perpetuity. When the immediate object of the donor has become extinct, the benefit of the gift endures for the poor, "who never fail," even though there may be no mention of the poor in the instrument constituting the *wakf*. Such is unquestionably the opinion of Abu Yusuf, and this is the accepted doctrine of the orthodox Hanafi school. It may seem strange to us that the mere use of this expression *wakf* or *sadakah* will sanction a perpetuity which would not otherwise be valid. But so it is, and as the Mohammedan law, according to its best interpreters, is the law to be applied to such transactions, we have to take it as we find it. Doubtless to a Mohammedan judge some provisions of our own law would appear equally strange, and devices for evading general principles of law are not unfamiliar to English or Continental jurists. Nothing can be conceived more likely, as observed by the Privy Council in a much earlier case, "to give just alarm to the Mohammedan community than to learn by a judicial decision that

their law, the application of which has been justly secured to them, is to be overridden upon a question which so materially concerns their domestic relations" (*Munshi Buzloor Rahim* v. *Shumsulnissa Begum* [1867], 11 Moore's Ind. App., p. 614).

(*b*) *In Regard to a Wife's Refusal to Cohabit until Payment of Prompt Dower.*—Another instance of a judicial decision materially modifying the provisions of the Islamic law, while professing merely to interpret that law, may be cited as illustrating the danger of acting upon false analogies. It is all the more remarkable that in the instance about to be mentioned it was a Mohammedan judge himself who applied these analogies. The question in the case referred to[1] was whether a woman whose prompt dower remained unpaid but who had once cohabited with her husband may be compelled to cohabit against her will, if she refuses cohabitation in order to exact payment of such dower. Upon this point there had been three previous decisions[2] by the Allahabad High Court, affirming the wife's right of refusal under the circumstances stated. But in the case we are now considering these decisions were dissented from, and it was held, on the contrary, that after cohabitation non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights. In arriving at this conclusion the very learned judge (Mr. Justice Mahmud) who delivered the judgment of the Court was apparently largely influenced by the analogy he perceived to exist between the lien of a vendor upon the goods sold while they remained in his possession and the right of a wife to resist her husband so long as her prompt dower remains unpaid, and the further analogy between the surrender by a wife of her person to her husband and the delivery of the goods by the vendor before payment of the dower in the one instance and the price of the goods in the other.

But the analogy is surely more on the surface than in reality. A vendor is presumably a person who is independent of his vendee, and if, by his own voluntary act, he surrenders his lien by giving up delivery of his unpaid-for goods, he may well be bound by the consequences of his act. But a wife can scarcely be said to be in the same position. In surrendering herself to her husband before exacting payment of her prompt dower she is merely fulfilling the main object of matrimony. Her submission, considering the obligations and duties arising out of marriage, can scarcely be likened to the voluntary delivery of his unpaid-for goods by a vendor standing in a wholly independent position with respect to his vendee. The question at issue, therefore, was one to be decided solely with reference to the precepts of the Mohammedan law. In dealing with this aspect of the case, Mr. Justice Mahmud seems to have laid undue stress upon the difference of opinion in regard to the point before him between Abu Hanifa and his two disciples. But the

[1] *Abdul Kadir* v. *Salima* (1886), I.L.R. 8 All. 149; followed in I.L.R. 11 Mad. 327; and I.L.R., 17 Cal. 679; No. 164 P.R. 1889.

[2] See I.L.R. 1 All. 483; 2 *ibid.* 831; and 4 *ibid.* 205.

extent of this difference is fully explained in a passage of the *Radd-el-Muhtár*, from which it appears that while the disciples asserted that after consummation the wife had no right to refuse herself for non-payment of her exigible dower, they were of opinion that if she *did* so, it merely involved the consequence that she could not upon such refusal claim maintenance if she was not at the time in her husband's house, though even this consequence would not follow if the refusal took place in his house. This explanation does not appear to have been brought to the learned judge's notice, and, apart from it, the weight of authority, as shown by Mr. Justice Amir Ali in the second volume of his *Mohammedan Law*, pp. 397, 398, would seem to be distinctly against Mr. Justice Mahmud's view. Here, then, we find an eminent native judge giving his high sanction to a doctrine which the original authorities can scarcely be said to countenance, and which has revolutionised the pre-existing case law by resorting to the dangerous and often misleading practice of drawing conclusions on the basis of supposed analogies.

Effect of Judiciary Law upon Customary Law in the Punjab.—We find much the same sort of tendency when we consider the course of decision with respect to customary law in the Punjab. It is common knowledge that in that province the written Hindu and Mohammedan laws have not obtained the same authority as elsewhere. The village system predominates, and community of interests, founded on community of land-holding, have produced a body of customary usages which Hindus, Mohammedans, and Sikhs alike observe. In large towns and cities, of course, the condition of things is somewhat different, and the absence of any community of interests leaves the residential population free to follow the personal laws of their own co-religionists. In dealing with cases of succession and alienation of property in village communities, it is too often forgotten that it is not similarity of tribal, but community of land, interests which furnishes the true test of the regulating custom. But there have been judges who could examine no question of succession or alienation of property except with the aid of what I may call tribal spectacles: they deluded themselves into the belief that members of the same tribe would be found to follow the same customs wherever they happened to locate themselves. But all historical enquiry proves that this notion is not in accordance with actual facts in the case of land-holding communities. In most villages we find that people of various tribes and religions have co-operated to establish the community, and it would have led to ceaseless conflict and confusion if each incoming helper had introduced his own tribal or personal law in respect to his individual holding. So far as the land within the community was concerned, a common rule for its descent and transfer had to supersede all other personal laws. This rule was probably originally set by the founder or his descendants, and as new-comers settled within the village and acquired land there they had to submit to it as a condition of retaining their holdings. In course of time the recollection of the actual origin of the customary rule regulating

the devolution and transfer of village land would be lost in the sanction accorded to it by common consent; and since one village in its primitive constitution is but a type for another and like conditions of social life ordinarily produce like habits and notions, it is not matter for surprise that the rule regulating such matters as those above mentioned should be found to prevail generally in all villages of the same type. A rule of this kind would naturally aim at keeping the land within the family of each co-sharer, and as males would be more desirable for purposes of agriculture than females, the former would be naturally preferred to the latter. So for obvious reasons the rule would aim also at preventing transfers to strangers, whose admission without the consent of the co-sharers generally would only tend to introduce elements of discord and strife.

We have no need, therefore, to resort to abstract theories based on imaginary tribal customs and agnatic succession to explain rules which have a far simpler origin, and which are essentially characteristic of all primitive village life. But the forced application of such theories has not only given a false direction to judicial enquiry in matters of the kind already referred to, but it has also revolutionised a long course of decisions in regard to another very important question of customary law—viz., the adoption of a daughter's son by a sonless proprietor. For a quarter of a century the Chief Appellate Court of the Punjab had recognised the validity of such adoptions, which not only corresponded to the natural instincts of humanity, but coincided also with the voice of village public opinion. Then the theory of agnatic succession was started to account for the preference shown to males in the devolution of landed interests, which, as already shown, had in reality nothing to do with any such theory; and upon the strength of this false premiss, the further and mischievous deduction was made that the adoption of a daughter's son, offending as it did against this theory, must be *presumed* to be invalid unless affirmatively established by local custom or sanctioned by the agnatic brotherhood. If the person supporting such an adoption adduced instances where such adoptions in the same tribe, and even in the same family, had received judicial recognition, he was met with the answer from the Bench that this was owing to the false notion formerly prevailing as to the validity of such adoptions and to the *onus probandi* having been placed on the wrong party. A series of uniform decisions extending over a period of twenty years was thus ignored on the strength of doctrinaire theories which were wholly inapplicable. Nothing was more common thirty years ago than for a sonless proprietor who had a daughter to stipulate on her marriage that she should continue to reside with him, and that her first-born son should be adopted by him. Popular feeling was distinctly in favour of such an arrangement, which was in accordance with natural claims and kept the land in male hands within the family; and the daughter's son was thereupon regarded as an appointed heir and the natural successor to the grandfather, in preference to distant male

collaterals residing, most likely, elsewhere, and who had perhaps never been seen within the village. The adoption of—or more correctly speaking, the appointment of—a daughter's son as heir thus became popularised and was constantly met with in almost every village of the Punjab. We see the same tendency in other parts of India, where a growing usage has, even amongst Brahmins and the three regenerate classes of Hindus, sanctioned such appointments. But since 1891 the rule of agnatic succession has been rigorously applied in the Punjab, to the subversion of the older customary law, thus creating confusion and uncertainty of title.

The above examples will suffice to show, on the one hand, how the application of western modes of thought to the solution of legal problems in the East has sometimes given a completely new complexion to some provisions of the ancient Hindu, Mohammedan, or Customary law. The change produced may not have been intentional: on the contrary, in each instance the tribunal concerned has no doubt endeavoured to interpret the native law according to what it conceived to be its true spirit. But the influence of early teaching and reading has induced the most active minds to seek analogies which were in reality fallacious or misleading, and to trace the development of particular doctrines to a source which was completely foreign to the system to which they belonged. On the other hand, we have seen how English judges presiding in Indian Courts have brought a higher intelligence to bear upon the interpretation of difficult texts, and how frequently they have happily succeeded in adapting the ancient law to the existing conditions of social life.

Extent of Influence of British Administration upon Native Laws Summarised.—On the whole, then, it may be said that the influence of English jurisprudence and legislation upon the pre-existing native laws is chiefly traceable in giving India a Penal Code with graduated and rational forms of punishment, in completely remodelling the administration of criminal justice, in supplying our Indian fellow-subjects with several well-considered codified enactments affecting different branches of Civil Law unconnected with religious institutions, in effecting the abolition of some ancient usages which were not consistent with the principles of enlightened government, in securing ample religious toleration for all classes and sects, in procuring emancipation for the domestic slave, in permitting Hindu widows to re-marry, in producing a more liberal interpretation of ancient texts, in giving custom and local and family usages a statutory sanction, and in emphasising the distinction between moral and legal obligations. So far the influence has been for good, and has generally carried native public opinion with it. But the influence has also extended in other directions, and with not the same measure of success. We have seen, for instance, how it has revolutionised the doctrines of Mohammedan law concerning charitable gifts and a wife's right to resist her husband until payment of her prompt dower, and how it

has also subverted the ancient customary law of the Punjab upon certain important points.

Conclusion.—Direct legislation has naturally played a very prominent part in leaving a permanent impress of British administration upon the native laws; but the silent and indirect methods which have been traced in the preceding pages have also contributed largely towards the same result. Nevertheless, it cannot be denied that the British Government has kept good faith with the promises which it gave in 1773 and in subsequent years of not interfering with the laws "relating to marriage, inheritance, and caste, and other religious usages and institutions," and the native races of India still enjoy the great privilege of being governed by their own laws, intelligently and honestly administered, in respect to those matters which more directly appeal to their religious sentiments or social usages. No conquered races, in fact, have ever felt the rule of the victor less oppressive or have had more reason to accept with loyalty the destiny which has unified them with the other subjects of a great and constitutional Empire, in whose glory they can share a common pride and under whose mighty protection they are secure from all external foes.

ON THE EDUCATION OF NEGLECTED CHILDREN IN GERMANY.

[*Contributed by* Dr. Fritz Rathenau, *Berlin.*]

Child-Crime and its Prevention.—The opinion is more and more gaining ground that the most effective means of combating crime is not in subjecting children to treatment as criminals. More and more it is recognised that the real question is not how to improve youthful criminals after they have got within the meshes of the law, but to prevent them from becoming criminals. How little can be accomplished by the former method is shown by the increasing juvenile criminality in Germany.

According to the official Criminal Statistics for 1896,[1] in the German Empire in the year 1882, 30,697, and in the year 1896, 43,962, "young persons"—*i.e.*, between twelve and eighteen years—were punished for crimes and offences against the laws of the Empire (all minor offences are excepted). This means an increase of 43.2 per cent., and in relation to population an increase of 22 per cent. Crimes by adults increased during the same period only 34.1 per cent., or 16 per cent. relatively to population. A very considerable part of this increase is in convictions for dangerous injuries to the person (112.5 per cent.), for injuries to property (48 per cent.), and for using compulsion and threats (about 300 per cent.).

Neglect and the State.—The new law, which came into force in Germany on January 1st, 1900, as also the corresponding Land Laws, were intended to effect a change as to this class of crime and to adopt, to some extent, new methods. It was assumed that the right of parents to educate their children was subordinate to the right of the State to prevent children being ruined through neglect. If through want of proper education, it was said, the number of criminals increases, the community is the sufferer. On this ground, and as the guardian of public morals, the State possessed a right and an interest in concerning itself with education. The interference on the part of the State in the education of minors is no longer regarded as a repressive, but as a preventive, measure. In the preparation

[1] See *Statistik des Deutschen Reiches*, vol. xcv. i., p. 28.

of the law special and repeated reference was made to the experience acquired in England, where the State and private benevolence have taken in hand the education of juveniles with good results.

The Prussian law of July 2nd, 1900, which came into force on April 1st, 1901, for the "guardianship education" (*Fürsorge-Erziehung Minderjähriger*) of minors is a part of the legislation regarding the education of neglected children. In order to correctly understand and appreciate the new law, a short explanation is necessary of the previous state of the law on this subject.

Offenders under Twelve.—According to the Imperial Penal Code (§ 55), no penal proceedings can be taken against persons who have not yet completed their twelfth year. They may be placed in a family,[1] or in a school or reformatory, if the judge of the Court of Ward (not the judge of criminal cases) shall have previously satisfied himself as to the commission of the offence, and declared that it is expedient to place the culprit in a family or reformatory. Persons from twelve to eighteen years of age—minors in the stricter sense of the word—can be dealt with by the judge of criminal cases. They are, however, to be released if in the commission of the offence for which they are charged they did not possess sufficient intelligence to perceive the culpability of the offence. In such a case the culprit may be either handed over to a family or sent to a school or reformatory (Penal Code, § 56). The State, it will be seen, interferes in education only when a punishable offence has been committed.

Operation of the Old Law.—Many of the German States have availed themselves of the provisions of § 55. A Prussian law of March 13th, 1878, relating to the provision for neglected children enacts that "whoever commits a punishable offence after the completion of the sixth year and before the completion of their twelfth year of age may be placed in a family, or sent to a school or reformatory, if this course is *necessary*, taking into consideration the nature of the offence, the character of the parents or other guardian of the children and the other conditions of life, in order to prevent *further* neglect."

In order that the provisions of this law may take effect, two conditions are necessary—the commission of a punishable offence and *de facto* neglect The right of compulsory education ceased with the completion of the eighteenth year of age or with a decision putting an end to compulsory education. Children of from six to twelve years could not, if they were able to understand the culpability of the offence (and could therefore be dealt with), be sent to a reformatory school. On the other hand, children from six to twelve years, even when there is *de facto* neglect and a clear necessity of provision being made for them, could not be compulsorily educated when there is no evidence of a punishable offence committed by the child.[2] To neglected children who

[1] Only permissible since January 1st, 1900.

[2] This was the principal fault of the Prussian law. See thereon, especially, Appelius's

had not yet committed any punishable offence, only the provisions of the Prussian Allgemeines Landrecht of February 5th, 1794 (§ 86, Part II., 2), applied: it allowed interference by the State with the parental right of education, against the will of the parents, but only when the parents were culpable—that is to say, when they cruelly maltreated their children, or brought them up in evil ways, or deprived them of necessary support.

Neglected Children not Criminals—Conditions of State Intervention.—The state of the law which I have described could not be regarded as satisfactory. The Code of Civil Law which came into force on January 1st, 1900, applies to such cases. First of all it leaves the above-mentioned provisions of the Penal Code unrepealed, and they still apply to all cases where the neglect of the child results in a punishable offence, the punishment for which is not inflicted only because of the tender age of the child or to its being unable to understand the culpability of the offence. The Civil Code, however, contains also provisions with regard to neglected young persons who are not criminals. It permits the public education of a child without the latter having committed a punishable offence when the father or other person acting as parent (the mother or guardian) is guilty of a neglect of education. Thus, under § 1666 the Court of Ward (not that of Administration) is empowered to take the necessary measures for removing the danger "if the mental or bodily well-being of the child is endangered" (not simply prejudicially affected). "Endangered" includes these cases: (*a*) where the father abuses his right to take care of the person of the child; (*b*) where he neglects the child; or (*c*) if he is guilty of dishonourable or immoral conduct. The measures which are permitted may especially, though not exclusively, consist of the child being, for the purposes of education, placed in a suitable family or in a school or reformatory. An essential condition, it will be noted, is some offence by the father or mother, if they exercise the parental authority; as, for instance, if the father should employ the child in criminal or immoral acts; if he should abuse his right of chastising in such a way as to be dangerous to the child; if he should deprive a child a few months old of its mother without sufficient grounds;[1] if, owing to his being imprisoned, he is not in a position to provide for the maintenance and education of his child.[2] The above-mentioned cases illustrate clause (*a*); illustrations of clause (*b*) will be as follows: neglect to send to school, insufficient food, clothing and bodily attention; of (*c*): alcoholism, personal violence, begging, prostitution,

book, *Behandlung jugendlicher Verbrecher und verwahrlosser Kinder*, Berlin, 1892, p. 115. Other Laws—for example, those of Hesse and Baden—went farther; they ignored the requirement that the child must have committed a punishable offence, and authorised compulsory education even in the case of the moral neglect of the child. Others again—as, for instance, those of Saxony and Wurtemberg—extended the age limit up to which the order for compulsory education should be permissible to beyond the twelfth year.

[1] Oberlandesgericht Stuttgart in the *Deutsche Juristen Zeitung*, vol. v., p. 399.

[2] Kammergericht in the *Rechtsprechung der Oberlandesgerichte*, vol. i., p 286.

procuration of the father as regards the mother. The conduct of the father in religious or political matters is not a ground for the intervention of the Court of Ward; this has been expressly recognised by the Legislature.

If the child be under the charge of a guardian and there be reason to fear continued neglect, the judicial authority may place the child under compulsory education (§ 1838), even when the guardian is in no way responsible for the defective education. If in this case the care of the person of the child devolves on the father or the mother, the placing of the child under compulsory education can be effected under only § 1666—*i.e.*, where the parents are guilty of a neglect of education. With the consent of the father, and on his application, compulsory education is also permissible according to the Imperial law (§ 1631).

Opposition of Person "in Loco Parentis."—After a long parliamentary contest, the principle has been established by legislation (by the *Einführungsgesetz* of the Civil Code, Art. 135) that, independently of evidence of a fault on the part of the person acting as parent, the compulsory education of the child may be ordered even against the expressed wish of such persons "if it is *necessary* in order to prevent *complete* moral ruin."

"Guardianship Education."—By the law of July 2nd, 1900, mentioned above, Prussia has availed herself of this right. The object of this law, which repeals the old Prussian law of March 13th, 1878, is interference on the part of the State not only, and not merely, when the child *is already neglected*, but *also when it displays evidence of neglect.* This is shown by the altered title of the law and the alteration in the wording thereof. It is no longer a "compulsory education" which is spoken of, but a "guardianship education" (*Fürsorge-Erziehung*), an expression with which the German language has been enriched through this law; not "compulsory," implying reaction against, but "guardianship," implying protection against neglect. This "guardianship education," which practically amounts in many cases to a complete separation of the child from its family, is only to be resorted to if all other available measures for obtaining a proper education fail. Such other means are religious influence, schooling, the guardianship of the poor, voluntary charity, and also the admonishing of the person acting as parent. By law the "guardianship education" can only be ordered in the case of such minors as have not yet completed their eighteenth year (§ 1).

Unlike the existing law of Prussia, the new law does not fix a minimum age; it thereby considerably increases the number of those persons to whom the State education may apply. It is, however, laid down that children not yet of age to go to school shall only be put under a "guardianship education" if no other measure can be found to prevent the neglect of the child.

In what Cases Permissible.—In three different cases the "guardianship education" is permissible under the law:—

(1) When the provisions of the above-mentioned § 1666 or 1838 of the

Civil Code apply, and the "guardianship education" is necessary in order to prevent the neglect of the minor—in other words, in case of the father or other person acting as parent (except the guardian) being guilty of a fault of education. It is sufficient that a danger of neglect, whether of moral, mental, or bodily kind, should exist; it is not necessary that complete neglect should exist. Examples are given above.

(2) If the minor has been guilty of a punishable offence for which, on account of his tender age, the punishment cannot be inflicted. This applies only to minors under twelve years; but the "guardianship education" must be ordered only after taking into consideration the nature of the offence, the character of the parents, and the other conditions of life, with a view to preventing further neglect of the minor; it must, in fact, be applied as under the former Prussian law, taking into account the whole facts of the case as affecting the mental and material well-being of the particular child. Cases 1 and 2 differ in this, that in the latter a punishable offence (no matter of what kind) committed by the minor and *de facto* neglect (the one does not necessarily imply the other) must exist. The new case is of particular importance, viz.—

(3) If "guardianship education" is necessary in cases other than those above mentioned "on account of inadequate educational influence of the parents or others responsible for the education or of the school, *with a view to prevent the complete moral ruin of the minor.*"

The novel features of this Statute, and the great advance which it makes, is that there may be "guardianship education" without any fault on the part of a minor or of his parents; though, in order that this might be so, there must be degeneracy of the minor in a moral sense. This will make it possible to bring under compulsory education children who throw off or resist the control of parents and guardians, who frequent bad company against the wishes of their elders, and especially females under age who have given themselves up to professional prostitution, or who are likely to do so. The law will apply in the first instance to children of the poorer classes; but it may here be especially pointed out that also children of well-to-do and rich parents may be placed under "guardianship education," and especially from the point of view mentioned under No. 3.

In view of the far-reaching effect of this enactment I concur in the opinion of a German *savant*,[1] who says: "Truly it is a heavy blow which is hereby directed against the *patria potestas*, but a blow which is necessary."

How Carried Out—"Suitable Family or Institution."—The "guardianship education" will be "under official supervision and at the public expense" in a suitable family or in an educational or correctional institution (§ 2). By this clause the difference between the compulsory education provided for in the Civil Code and the "guardianship education" of the present law is defined in the first instance in so far as the

[1] v. Calker in the *Deutsche Juristen Zeitung*, vol., v. p. 56.

latter education takes place at the public expense under the supervision of special Government departments. In both cases the question whether compulsory education or "guardianship education" is to apply is to be decided by the Court of Ward. The latter also decides as to the manner in which the child is to be provided for under compulsory education. The manner of providing for the child under "guardianship education" and the nature of the education itself are left to the discretion of the Government Board of Management. The Court decides upon request or *ex officio* that "guardianship education" is to take place; the class of persons either entitled or bound to make such requests (everybody is entitled to give notice) is defined by § 4. If the parents and the legal representative of the minor can be heard without considerable difficulty, they should be heard, and the director or teacher of the school at which the minor in question attends *must* be heard before the Court comes to a decision. There is a right of appeal against the decision ordering "guardianship education" (§ 4). Minors may be provided for in various ways, either in a suitable family or in an educational or correctional establishment. The Legislature has deliberately declined to determine when education in a family and when education in an institution is to be made use of. In each separate case there is to be a decision according to the peculiarities of the pupil, the kind and the causes of his or her degeneracy and the possibility of finding suitable families.[1] Neither does the Legislature define whether and when a family is "suitable"; it only insists that "the pupil must be accommodated in a family of his or her own persuasion for the time at least during which he or she is liable to attend school" (§ 9). As to this matter, rules have been drawn up by the administrative authority. The family "shall offer guarantees for a serious religious and moral education"; it must have a well-regulated and sufficiently large home. Families living in the country or in small towns, where the pupils may have an opportunity of occupying themselves with agricultural and garden work, are to be especially preferred. Families living in large towns or densely populated industrial districts are to be avoided as far as possible. The family should not live too near the present place of abode of the pupil, and not more than one pupil should be accommodated in one family. The "guardianship education" conducted in the pupil's own family may be allowed only subject to the permission being revocable (§ 10), and it shall only be ordered if the conditions which caused degeneracy have been removed. For every pupil accommodated in a family a "curator" is appointed to watch over his or her education and maintenance (§ 11). This office, which is honorary, may be filled by women; for children under twelve years of age and for female pupils women are to be preferred as curators. As to education in institutions, the pupil "as far as possible" is to be accommodated in an institution of his or her own persuasion. In no case may pupils be placed in workhouses or country

[1] Compare in this connection Aschrott, p. 41.

almshouses. They may be placed in institutions for the sick, infirm, lunatic, deaf and dumb, or blind only so long as may be required by their physical or mental condition (§ 10). Such institutions must offer opportunities for occupying the pupils out of school hours (the course of instruction to correspond to that of the primary schools) with work in the field, garden, and house. They should be arranged to accommodate from one hundred to one hundred and fifty pupils, and separation of the sexes must be observed. The education in institutions, however, shall continue so long as is absolutely necessary for making the pupil used to good order and discipline, and for strengthening them physically and mentally. When this result has been obtained, the pupil is, according to the rules of the administration, to be placed in a family for his or her education—with the reservation that he or she will be sent back to the institution if he or she should not behave in a proper manner.

Termination of "Guardianship Education."—"Guardianship education" ends when the pupil comes of age (§ 13)—*i.e.*, after the completion of twenty-one years. It may, however, be terminated sooner by a decision of the administrative authority on his own initiative or upon demand, if the purpose of the "guardianship education" has been obtained or the purpose in view has otherwise been secured (§ 13)—*i.e.*, if the pupil is under absolutely safe conditions, which make a relapse into degeneracy, so to say, impossible. For this purpose it is stipulated by the administrative authorities that before completion of the time during which the pupil is liable to attend school, a place of service or an apprenticeship with trustworthy and experienced persons shall be provided. The situation must be suitable to his capabilities and conditions of life and, if possible, in accordance with his inclinations. The termination of the "guardianship education" before its due course can take place under reserve of revocation; in such a case the condition will apply that the minor submits to the supervision ordered by the administrative authority.

Expenses and Accommodation.—It is not possible to explain here in detail the conditions as to expenses and the questions as to authorities on whom it devolves to find accommodation for minors. The following remarks may be sufficient: In the first instance the provincial associations (*Provincialverbände*) have the obligation of establishing educational or correctional institutions. The principal expenses for maintenance and education, and for providing for discharged pupils, are to be borne by the communal associations (*Kommunalverbände*); the Government supply two-thirds of these expenses. The communal associations have the right to recover from the pupils, or the persons liable to maintain the same. The law (§ 5) provides further for a "provisional disposal of the minor," if danger is to be feared. In these cases also the Court of Ward decides on the matter. Finally, there is a new penalty clause with the object of securing the carrying out of the "guardianship education." This clause threatens—independently of

unlawful deliverance of prisoners punishable by Imperial law (Penal Code, § 120) and of kidnapping (Penal Code, § 235)—with imprisonment up to two years, with a fine up to one thousand marks, or with any one of these penalties, the person withdrawing any minor respecting whom legal proceedings have been commenced in order to bring the same under "guardianship education" or who has been ordered to undergo "guardianship education" from such said proceedings or such "guardianship education," or inducing the same to withdraw from such process or such "provident education" or intentionally assisting him or her in doing so. The attempt also is punishable. Self-withdrawal, on the other hand, goes without punishment. The law leaves open the question whether foreigners can be subjected to "guardianship education." The question may be answered in the affirmative in case a foreigner according to the laws of his country requires the care of a guardian and the foreign State upon request of the German Court does not undertake such duty. This is a corollary from the *Einführungsgesetz* of the Civil Code, Art 23.

The End of the Legislation—The Moral Training of the Young.—From this short sketch it appears that the leading idea of the new law is to attempt to prevent the demoralisation of youth by a thorough dissemination of moral principles. The law leaves free play to the activity of guardianship and educational associations and to charity which seeks to act, not so much by giving monetary assistance, as by the force of moral example and restraint. The administration of this law in the manner intended by the Legislature will be the best answer to these words lately uttered by a high German Government official: "The law which makes the judge of the Court of Ward the custodian of youthful persons contrary even to the wishes of their parents implies a terrible accusation against society."

HIGH TREASON IN NATAL.

In the Natal Law Reports are several cases relating to high treason and dealing with points of interest. In *Regina* v. *Vernaak* the defences set up were that on the British evacuating Dundee the prisoner became, or *bona fide* believed that he had become, a burgher of the South African Republic, and that he committed the acts of treason under compulsion. The comment of the Courts on these pleas in overruling them was as follows :—

> There is, in our opinion, no doubt about the principle of International and Municipal Law applicable to questions of allegiance in the circumstances disclosed in the case before us. When a country is occupied in the course of hostilities by an enemy's force, measures must be taken by the hostile power for preservation of order and the administration of government. This would, of course, include the establishment of a police force and judicial courts. The citizens of the occupied country are bound to obey the laws of the hostile State in the same way, subject to military necessities, as ordinary residents in a foreign State; but it is quite clear that during the progress of hostilities no change of allegiance takes place or can be recognised. Military occupation of a territory during the progress of hostilities does not amount to conquest, and whilst temporary subjection to the laws of the country whose forces have occupied the territory is conceded, the right or obligation to take up arms on behalf of that country is not recognised. To allow such a right would afford a mask to and pretext for desertion, and would enable the inhabitants of the occupied territory to give assistance and adherence to the public enemy. No change of allegiance could, therefore, take place in the manner suggested, and the claim of the prisoner that he was entitled to take up arms against her Majesty the Queen, whose subject he was, cannot for a moment be sustained. Nor could any *bonâ fide* belief on his part in the existence of such a right afford any grounds of a defence in law, though it might be urged in mitigation of punishment. With regard to the defence of compulsion, we are of opinion that the compulsion must be continuous, and such as to produce a reasonable and substantial fear of immediate death or serious bodily harm.

In the case of *Regina* v. *Prozesky*, a native of Germany, who had resided in Natal for more than thirty years, who had in 1898 taken the oath of allegiance, and whose name was entered on the voters' roll as a naturalised subject (though by a mistake letters of naturalisation had not been issued to him), was indicted for high treason, and the Court held him guilty of high treason on the following grounds :—

> So far as the Roman-Dutch Municipal Law is concerned, the authorities are clear that a foreigner who has his fixed domicile in this country may be punished for

treason in the same way as a natural born subject. (Voet 48, 4, 4; Matthaeus de Crim., 48, 2, cap. 1, s. 7; Carp., Part I., question 41, obser. 2, p. 315.) The doctrine stated in some of the English cases, that a foreigner owes a local allegiance, by a sort of quasi contract, in return for the protection afforded to him, is in our opinion neither so logical nor so consistent with our law as the principle laid down by Vattel (*Law of Nations*, Chitty's translation, p. 172) in these words: "In those countries which every foreigner may freely enter the Sovereign is supposed to allow him to enter only upon this tacit condition, that he is subject to the laws—I mean the general laws made to maintain good order, and which have no relation to the title of citizen or of subject of the State. The public safety, the rights of the prince necessarily require this condition; and the foreigner tacitly submits to it as soon as he enters the country, as he cannot presume that he has access upon any other footing. The sovereignty is the right to command in the whole country; and the laws are not simply confined to regulating the conduct of the citizens towards each other, but also determine what is to be observed by all orders of people throughout the whole extent of the State. In virtue of this submission foreigners who commit faults are to be punished according to the laws of the country." With regard to International Law, the privilege accorded to neutral foreigners of remaining in a country after a declaration of war is entirely irreconcilable with any right on their part to assist the enemy against the Government of their domicile, during a military occupation of a portion of the country in the course of hostilities. It seems probable that the rights of the British Government against the prisoner would embrace much more than the enforcement of neutrality having regard to the cases in which British subjects were held liable to conscription during the American Civil War. (Halleck, vol. i., p. 419.) For these reasons we are of opinion that if the acts charged against the prisoner be proved, he is liable in the same way as a natural born subject.

A third case (*Regina* v. *Badenhorst*) raised the question whether the prisoner, a burgher of the South African Republic, who resided in Natal and who remained in Natal after the outbreak of hostilities, could be guilty of high treason in joining the South African army when it invaded the Colony. The Court held that he was guilty of high treason.

It is urged for him that he never acquired any domicile in this country. We do not think it necessary to decide to-day whether, as a matter of fact, this man had acquired a legal domicile in this country for all purposes. It is sufficient that the man resided here, and was not merely a casual visitor. It is not requisite that he should have acquired a legal domicile to make him subject to the ordinary law of the country. This man might, on the declaration of war in October of last year, have gone over the border into the Transvaal. Had he done so, and returned with the forces of the enemy, undoubtedly he could not be prosecuted for high treason. As a burgher of the Transvaal, he was not merely entitled, but was bound to go back and join the forces of his country, and then he could return and fight for them, without being amenable to our laws. But if he did not do that, but continued to reside here, and obtain the benefit and protection of the laws of this Colony, he was not entitled, even after this part of the Colony was overrun by the forces of the enemy, to cast his local allegiance to the winds, and join the forces of the enemy, and fight against the British. For these reasons it seems to us that the prisoner must be convicted from this indictment. Of course, we recognise that this case is a very different one from that of other cases tried in this Court, where persons who were born or became naturalised British subjects in this Colony have taken up arms.

CRIMINAL RESPONSIBILITY IN MENTAL DISEASE.

[*Contributed by* A. Wood Renton, Esq.]

In view of the interest which the comparative law of crime and punishment is attracting to itself at present, it may be useful to give a synopsis of some of the tests of criminal responsibility in mental disease that have been adopted in different countries.

ENGLAND.

The law of England on the subject was declared by the rules in *Macnaughton's Case* (1843, 10 Cl. & F. 200); but the judicial interpretation of these rules has not been uniform; and there has been in recent years a tendency among some of the judges to manipulate them so as to extend their exculpatory operation to various forms of moral insanity. The following statement is taken from Sir James Stephen's *Digest of the Criminal Law*, pp. 20, 21. The clauses in italics are doubtful.

"No act is a crime if the person who does it is, at the time when it is done, prevented, *either by defective mental power or* by any disease affecting his mind—

(*a*) from knowing the nature and quality of his act, or

(*b*) from knowing that the act is wrong, *or*

(*c*) *from controlling his own conduct, unless the absence of the power of control has been produced by his own default.*

But an act may be a crime, although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned."

The cases in which the more liberal construction of the rules in *Macnaughton's Case* have been adopted will be found collected in Dr. Orange's article on "Criminal Responsibility" in Tuke's *Dictionary of Psychological Medicine*, and see a more recent instance, *Regina* v. *Leggatt*, 1897, *Jour. Ment. Sci.* vol. xliii. N.S. 420.

It may be added that, according to *Macnaughton's Case*, insane delusion is an excuse for crime when, and only when, the circumstances imagined would, if they actually existed, constitute such an excuse. This criterion has been

criticised on the ground that it first admits that a man is insane and then requires him, at his peril, to reason sanely. But, although not altogether satisfactory, it is substantially the same test as is now, with general acceptance, applied with reference to testamentary (*Banks* v. *Goodfellow*, 1879, L.R. 5 Q.B. 549) and contractual (*Jenkins* v. *Morris*, 1880, 14 Ch. D. 674) capacity in mental disease.

INDIA.

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law (Indian Penal Code, Act No. 45 of 1860, s. 84).

There is a very able commentary on this provision in Mayne's *Criminal Law of India*, s. 163 *et seq.*

CANADA.

"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

"A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity . . . unless the delusion caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved" (Criminal Code, 1892, s. 11).

It will be observed that the test, according to Canadian law, of criminal responsibility in mental disease is substantially identical with our own. The substitution of the word "appreciating" for "knowing" the nature and quality of the act may make a liberal interpretation of the law, in its practical administration, easier than it is in England.

FRANCE.

"Il n'y a ni crime, ni délit, lorsque le prévenu était en état de démence au temps de l'action ou lorsqu'il aura été contraint par une force à laquelle il n'a pu résister" (Code Pénal, Art. 64).

This article expressly recognises "irresistible criminal impulses" as a valid exculpatory plea.

GERMANY.

An act is not punishable if its author at the time of committing it was in a condition of mental derangement which prevented the free exercise of his will (Code Pénal, Art. 51).

ITALY.

A person is not punishable for an act if at the time of committing it he was in such a state of mental weakness as to deprive him of a knowledge of what he was doing or of freedom of will in regard to it (Code Pénal, Art. 46).

Art. 47 makes elaborate provision for the application of the theory of modified responsibility in cases where the mental state of an accused person does not warrant his complete exculpation from the consequences of his acts.

THE UNITED STATES.

The rules in *Macnaughton's Case* have been adopted in many of the American Courts (see *State* v. *Spencer*, 1846, 1 Zab. 196; *Willis* v. *People*, 1870, 33 N.Y. 715; *U.S.* v. *Holmes*, 1858, 1 Clif. 98; *U.S.* v. *Shults*, 1854, 6 Mack. 121; *People* v. *Hobson*, 1861, 17 Cal. 424; *People* v. *Coffman*, 1864, 24 *ibid.* 230; *Freeman* v. *People*, 1847, 4 Den. 9; *U.S.* v. *Guiteau*, 1883, 1 Mack. 498); but the modern trend of American judicial opinion appears to be increasingly adverse to them. The "opinion" of Judge Somerville in *Parsuns* v. *State*, 1887, 81 Ala. 577 contains an admirable statement of the history of the rules and the objections to them. See also, as recent examples of a similar departure towards a recognition of "moral insanity" in some of our own Colonies, the Queensland Criminal Code, 1899 (63 Vict. No. 9), s. 27, and the decision of the Supreme Court of the Cape of Good Hope (De Villiers C.J. and Maasdorp J.) in *Reg.* v. *Hay*, 1899, 16 S.C.R. 290.

MILITARY SERVICE AND IMMUNITY FROM ARREST.

The Colonial Secretary of the Government of Ceylon has been good enough to forward to us a report for the year 1900, prepared by Mr. Hermann A Loos, barrister-at-law, of the chief cases decided in the Courts of the Colony. Among the interesting decisions set forth in the report is one determined in the District Court of Colombo, *V. R. M. M. Chetty and J. E. B. Horsfall,* and subsequently in the Supreme Court of the Colony, involving the question whether a warrant of arrest could issue against a defendant, a soldier ordered on active service. While an action between the plaintiff and defendant was pending, and before judgment was obtained, the defendant enlisted as a volunteer in the Ceylon contingent of troops going to the war in South Africa. The plaintiff applied to the Court for the arrest of the defendant, whereupon the Court issued a warrant for his arrest. The defendant having surrendered, the question of liability was argued, and judgment was given on January 31st, 1900, by Mr. F. R. Dias, the additional district judge, who decided (contrary to a decision by Mr. Berwick in 1884), that "a military officer is not exempt from liability under our laws." On appeal the case came up before the Supreme Court on February 1st, 1900, and after argument on both sides the following judgment was delivered by Mr. Justice Lawrie, Senior Puisne Judge, and Mr. Justice Browne, Acting Junior Puisne Judge.

Lawrie J.: In my opinion a resident of Ceylon, who is about to leave the island temporarily in obedience to the orders of his commanding officer, cannot be said to be about to quit the island in the sense of s. 650 of the Civil Procedure Code. But I rest my judgment on higher grounds. In time of war the claims of individuals must give way to the paramount right of the Queen to the services of her subjects. Mr. Horsfall, who is now before the Court, is a volunteer whose services have been accepted by the Governor. He has sworn to serve the Queen in South Africa, and he is now under orders to sail to-day for active service in the war. It would be against public policy to prevent him from obeying the orders to embark. He may be comparatively an unimportant member of the Army, but every man is needed. The country expects that Mr. Horsfall will do his best, and will do good service in the field. To my mind it is plain that the rule *salus populi suprema lex* applies. It is obvious to me that it would be illegal to permit the arrest on a judgment for a civil debt, still less an arrest before the judgment,

of a general ordered by the Queen to command an army, or the arrest of the officers in command of a contingent under orders for the war. It follows, I think, that if the officers cannot be arrested, the private soldiers cannot be. Their arrest and detention would lessen the safety of the country and imperil grave public interests. The right of the plaintiff to enforce payment of a debt due to him must give way to the rights of the Queen and the country to the debtor's services in the field. In revision I would set aside the order and discharge the defendant.

BROWNE J.: I agree with the remarks of my brother, and would say that it is possibly open to question whether the procedure for arrest before judgment under chap. 144 would apply in this case, since there is no reference thereto in chap. 36, which regards actions by and against military men. The judgment of Mr. Berwick was one which was pronounced in regard to the arrest of a debtor when there was no necessity for his services in the field, and I think his arguments apply *multa magis* in the present case when the volunteer contingent has been specially enrolled for military service. I am not certain whether the member that has been arrested comes under the provision or not of s. 12 of Ordinance No. 16 of 1890 of the Volunteer Reserve. I believe each of these members has a number, as in all regiments, and the numbers are over three hundred—so my cousin, who is serving, has told me—which, as the number of their body is one hundred and fifty, points out to me they are members of some other larger force, either volunteers themselves or the original Ceylon Mounted Infantry. If he so comes under this Volunteer Reserve, the law seems to make it absolutely necessary that he shall, when called upon, be under the unlimited control of the senior officer in command in the Colony. I hesitate for a moment to depart from the strict rules of procedure such as I sought myself to enforce as district judge in that action (11,719) by accepting the appearance before the Court of the subject of arrest when the formality of the signature of the commanding officer is not attached. I think that the provision of s. 590 ought to be taken to apply to all cases—that it was meant that the civil and military authorities should be always found to be acting in unanimity with each other—and that the Court ought not to deal with the matter except when the warrant had been endorsed by the commanding officer, and there could be no question as to the strict correctness of the procedure. I understand that it was not so endorsed here, and therefore at the present minute Mr. Horsfall is not liable to arrest. There has been, in fact, by this section of the Act, provision made for a dual control in procedure, and both the Army and the Civil Court must co-operate in giving effect to the process of law which would take a military man from his duty and deliver him to his civil creditor. I therefore concur in my brother's opinion.

THE ATTORNEY-GENERAL: Might I ask that the order may be communicated to the district judge and the record returned to him, because the gentleman has to surrender to-day.

A letter was forthwith drafted and despatched to the district judge informing him that the order had been discharged.

The following is the judgment of Mr. Berwick, formerly district judge of Colombo, which is referred to in the order of the district judge and the judgment of Mr. Justice Browne:—

The defendant is an officer holding her Majesty's commission in the regiment of the Royal Dublin Fusiliers, and is now serving with his regiment in the garrison of Colombo. It seems that several writs against his person have already issued from this Court in the ordinary routine of business without the attention of the

Court having been drawn either to the names of the parties or the special occupation of the defendant. Lately, however, on another motion of the same nature being made against the same defendant, the plaintiff's advocate in that case with great and characteristic propriety had it treated as a "special" motion, and drew my attention to the position of the defendant, referring me at the same time to arguments and authorities *pro* and *con*. Ultimately that motion was not pressed, and it became unnecessary for me to give a judicial opinion on the question raised. It is under these circumstances that the present motion has been brought forward in this suit, in which my attention has been expressly called to the fact that the defendant is described in the libel as a lieutenant of the "Royal Dublin Fusiliers, Fort Colombo." The fact that he is now serving with his regiment in the garrison of that fort has been acknowledged by Mr. Keith. I take judicial notice of the fact that her Majesty's military forces are now engaged in military operations suitable to a state of war existing or imminent, but not in this Colony. The question I have to decide is whether under these circumstances an officer of her Majesty's Army in actual service in garrison in a fortified place is liable to be taken by the civil power from his regimental and garrison duties under a warrant of arrest in an action for debt.

The plaintiff's proctor relies on s. 32 of the Fiscals Ordinance (No. 4 of 1867), which provides that "in every case of execution against property," the fiscal (sheriff) shall enforce writs of execution against property in the manner therein directed, and that "in default of such property being pointed out, or there being no property which the fiscal could seize," the debtor may be arrested by process "of execution against the person." And the general rules and orders of 1833, s. 1, clause 35, provide that if judgment be pronounced for any sum certain, execution may issue "against the property, movable or immovable, of the party against whom the writ shall issue, or against his person, or against both, as the judge shall consider the case may require."

These provisions, which indeed are rather of a "directory" nature than otherwise, must be taken as intended to apply to the ordinary cases only with which the Courts have to deal, and to those cases only in which the Courts have competent jurisdiction and power to arrest, and so as being subject to any provisions, whether created by Common Law or by legislative enactment, which either restrict the jurisdiction and power of the Courts or the liability to arrest. They provide general rules for these cases where that jurisdiction or that liability exists, but they neither expressly, nor I think by implication, affect those exceptions in cases in which the substantive law governing the Colony has excepted anything from the general powers and jurisdiction of the Courts, or created special privileges either in behalf of individuals or in behalf of the State. For example, it would be impossible to contend that ambassadors on a mission from one State to another were not inviolable from civil arrest, however general and wide might be the terms used in defining the jurisdiction of a Court or laying down its procedure, and this on grounds entirely independent of extra-territorial questions. Again, our practice is replete with instances in which witnesses and others who are judgment debtors, having business in our Courts of justice, have been held not liable to civil arrest in execution, *eundo*, *morando*, *et redeundo*, to, at, and from these Courts, although there is nothing in our local legislation or general rules creating any special exceptions in their favour. So also those who could plead minority, coverture, and so on would undoubtedly be exempt from liability to arrest in execution of a judgment, although there is nothing said about minors, married women, etc., in the provisions above quoted. The Supreme Court has expressly decided that a

married woman is not liable to arrest in execution of a judgment against her. It is therefore very plain that the provisions above quoted, although expressed in general terms, do not exhaust or narrow the law on the subject, and that they are controlled by the overriding substantive law of the country.

There are those whose positions and duties are such that any interference with the discharge of these could not occur without manifest injury to the interests of the State; and, if such a case could be conceived, I have no doubt that I should refuse to grant the process of this Court against the representative of the Sovereign in this Colony. I make this observation merely to indicate, by an obvious illustration, that where the clear and unquestionable interests of the State are involved, the Courts of the State must except these interests from any legislative provision couched in merely general terms. Although, of course, there are other, or, rather, connected, considerations concerning the dignity of, and respect due to, her Majesty which would affect such a case, and which probably did actuate the recent refusal to issue a subpœna as a witness by the High Court of Madras in the case of his Excellency Mr. Grant Duff. Applying this principle of regard to dominant State interests to the case before me, I conceive that there cannot be many things more obvious than that these demand that every officer actually serving in her Majesty's military and naval forces must be ready on the moment to go wherever her Majesty may require his military services; and this could not be if he were liable to arrest on civil process. Plainly the officer in question could not be arrested and imprisoned on a judgment debt in England, for the simple reason that imprisonment for debt does not exist in England, the only vestige of that barbarous institution now left there being imprisonment for contumacy in not satisfying a judgment which the debtor is able to pay, and that is quite a different thing from the obsolete "imprisonment for debt"; I of course except imprisonment for fraud and the like. Neither could he be arrested and imprisoned on a judgment like the present one in the continent of India. The Army Act contains special legislative provision for debts by officers in India. It is, however, silent as to debts in the Colonies.

Failing any express legislative enactment applicable to Ceylon in respect to officers actually serving in the Army, and holding, for the reasons already given that the Fiscals Ordinance is not exhaustive of the law, and does not exclude the exceptions constituted by the general Common Law of the country, which is the Roman-Dutch law, I am indebted to the learned advocate, Mr. de Saram, for referring me to Voet's *Commentary*, 2, 4, 39, where that commentator cites a number of authorities in support of his statement that on the ground of privileges soldiers "cannot be arrested [he is treating of civil process and not of criminal] while proceeding either to a fort or to the garrison to them," and that the same rule applies to those occupied in transporting military supplies or otherwise serving the public military interests. The reason he gives for the rule is the necessity of military discipline and the defence of the State. Of course these reasons apply *multo magis* to soldiers already out and doing military duty in the fort or garrison, and much more to officers than to men.

I therefore think that the defendant is exempt from liability to arrest in Ceylon in execution of a judgment of the Civil Courts for debt, and the only point remaining is whether this exemption is one of the nature of a personal privilege only which he is obliged to claim, and can only get the benefit of by claiming, or one which is matter of absolute law independent of an officer's own wish in the matter. It is undoubtedly true that in most cases of exemption of this nature it is a privilege which attaches to the individual (though in his special

capacity) and should be personally claimed. This has been determined in England to be the rule in respect to ambassadors and members of their households, etc., and manifestly holds where the Court would not otherwise be judicially informed of the individual's capacity and right of exemption. But I do not think that in all cases it is a matter of mere personal privilege, to be claimed or waived as the individual may desire. In the case of military men I apprehend that the exemption does not exist in the slightest degree for their interest, but solely for the public interest. One may conceive, though I trust the case is not a likely one, a military man contriving to be arrested for debt purposely in order to avoid proceeding on military duty. And, looking to the reason given by Voet, military discipline and the defence of the State—in other words, not the interests of the individual, but those of the State—I think that where, as in the present instance, the Court has judicial knowledge of the position of the defendant, which it has both from the record and from the proctor of the party moving, it is its duty to refuse the motion for arrest. If it were merely a matter of the defendant's personal interests I might allow the motion, plaintiff giving security for any damages the defendant might recover from him on account of the arrest; but there is no room for such a course when it is the public and not private interests which are the reason for the exemption.

I have only to add that I believe the point before me is an entirely new one in this country. There is no reported case; so far as I know the question has never before been decided in any of our Courts.

ENGLISH JURISPRUDENCE AND INDIAN STUDIES IN LAW.[1]

[*By* The Hon. Mr. C. L. Tupper, B.A., C.S.I., *Vice-Chancellor of the Punjab University.*]

An Indian Renaissance.—The remarks I am about to offer on English Jurisprudence and Indian Studies in Law are primarily addressed to those of you who have completed or are still pursuing the Law School course; but I wish also in parts of my address to submit for the consideration of men already practising at the Bar, of the Fellows of the University, and of members of the Punjab Commission who may be interested in legal studies some suggestions bearing on the prospects of those studies in India, and more especially on the opportunities which we in the Punjab possess for the scientific study of law.

It has happened several times in the course of history that the intellectual soil of a great country or continent has been overspread and fertilised by a great literature which was not its own. Rome, for instance, cannot be said to have had a literature of her own until the indigenous capacity for satire and rough versification had been fructified by contact with Greek art: *Græcia capta ferum victorem cepit.* And Rome, the mother of law and of jurisprudence, never produced a philosophy of her own, but borrowed the Stoic belief in a law of nature with those consequences upon the development of legal ideas which are well known to all readers of *Ancient Law.*

The Renaissance—that is, the intellectual transition from mediæval to modern Europe—may be said to have begun with the revival of letters and to have culminated in the Reformation; and in the revival of letters the great literatures of Greece and Rome rose, as it were, from the dead, to resume their sway over the minds of all races of the West which then had political importance. Here in India the establishment of British dominion has assigned to English literature the functions of Greek literature in ancient Italy and of Greek and Roman literature when the middle ages were passing away.

[1] An address delivered at the Convocation of the University on January 2nd, 1901. The proprietors of the *Asiatic Quarterly* have kindly allowed us to reprint this address.—Ed.

The more advanced races of this country have not been slow to accept as their classical models the masters of English style; and as years roll by we see increasing signs that western ideas are being assimilated, though the process of assimilation, largely aided by Indian universities, is necessarily slower than the process of acquiring proficiency in the use of the English tongue.

The rise of the universities in Europe was not directly connected with the revival of classical learning, and indeed preceded it, being due to separate causes, amongst which may be mentioned the spread of the scholastic philosophy, the influence of the Teutonic guilds, and the inadequacy of the cathedral and monastic schools to provide for secular instruction. Dante and Petrarch were the heralds of the Renaissance. It was, indeed, the lute of Petrarch that recalled the classic muse from Acheron. These great poets cover between them the period from 1265 to 1374. The school at Salerno, which perhaps should not at that time be called a university, was famous throughout Europe in the eleventh century. Though Bologna did not possess any university till the close of the twelfth century, lectures on the civil law were delivered there in 1113. The University of Paris was recognised as a corporation about the year 1211. The Universities of Oxford and Cambridge were modelled on that of Paris, and their origin may be traced to the twelfth and thirteenth centuries. Throughout the thirteenth and fourteenth centuries the founding of universities proceeded in the various countries of Europe, and though the revival of Greek and Latin scholarship was not their direct or original aim, the eagerness of the thousands of students who flocked to those centres of learning was an indication of that re-awakening in Europe to the intellectual life which we describe by the general name of the Renaissance.

The Indian Universities.—Compared with the venerable seats of European learning our Indian universities are but things of mushroom growth. The three oldest of the Indian Universities—those of Bombay, Madras, and Calcutta—are not yet half a century old, all three having been founded in the year of the Mutiny. We date, as you all know, from 1882. The Allahabad University was founded in 1887. The creation of all these universities may be ascribed to the urgent need of the higher education felt under the changed conditions due to the pacification of India, to the recognition in this country of the practical value of western knowledge as a means of livelihood, and, especially here in the Punjab, to a rekindled interest in Oriental studies, of which the torch had smouldered low amid the dust and smoke of many battlefields. In the revival of letters, in the Renaissance of Europe, there was an ardent enthusiasm for learning for its own sake. I fear we can hardly claim at present that the Renaissance due in India to the establishment of British rule is under that potent spell. But our universities, as I have said, are young; it is our season for hopefulness; and a long experience of this country has convinced me that the

ferment instilled into the intellectual life of India by habitual contact with western ideas is slowly but surely spreading as the knowledge of English becomes more common, and is operative less amongst students in the class-room than amongst men already engaged in the practical business of life.

The Study of Jurisprudence.—Taking, however, the foundation of the universities as one of the signs of the Indian Renaissance now in progress, I observe that all make some provision for instruction in law and all include in their law courses the study of jurisprudence. This could hardly be otherwise. No university would be worthy of the name if it ignored the theoretical and scientific aspects of a subject learnt as a means of entering on a profession. It is the function of a university to preside over an education, not merely such as will enable the students to earn their bread, but such as shall elevate their minds and enlarge their mental horizon. I hope that some one may be induced before long to examine thoroughly the whole question of legal education in India. The figures that I have been able to obtain are not quite up to date, but they exhibit a healthy growth, and show that we may at any rate reckon by some thousands every year those who, while yet young men, have some concern with the study of jurisprudence. In 1886–87 there were in India 18 law schools or colleges, including, of course, departments of colleges teaching law, and there were 1,716 students of law in these institutions. In 1896–97 the number of institutions had risen to 34 and of students to 3,020. The progress of our own Law School has been very remarkable: it had 71 students in 1886–87, in 1891–92 85, in 1900 370.

In whatever degree knowledge of the English language and contact with western learning may now be influencing other studies in India, there is no doubt that, in the study of jurisprudence, English jurisprudence reigns alone. It is therefore to the growth of English jurisprudence and to its relation to our own opportunities of furthering the cause of science, more especially in this province, that I wish to direct your attention to-day. In so doing I will ask you merely to bear in mind three great names, familiar as household words to all students of law. I refer, as you will have anticipated, to Bentham, Austin, and Maine.

Bentham.—Jeremy Bentham was born in 1748. His *Introduction to the Principles of Morals and Legislation*, though begun in 1776, was not published till 1789. His *Fragment on Government* was, however, published anonymously in 1776. His long life of benevolent enthusiasm ended in 1832, so that John Austin, who was born in 1790, had passed the mature age of forty whilst his predecessor was still at work. Maine was born in 1822 and died in 1888. *Ancient Law* was published in 1861, two years after Austin's death; and Maine's last work, his lectures on International Law, appeared posthumously. You will observe, therefore, that the work of these three great jurists covers very little more than a century, ending only twelve years ago. I think the Indian law students

of to-day are fortunate in having the field of English jurisprudence opened to them at a time when by the labours of these great masters it has been cleared of much useless matter which formerly cumbered the soil, and when these great masters have themselves indicated directly or by almost necessary implication the future methods of research.

Bentham was above all things an ardent reformer of the law. He inherited a fortune, and his life was uneventful. His time was passed working six or eight hours a day at his fragmentary and voluminous treatises on law and legislation and at the composition of his civil and criminal codes—leaving always much to be done by judicious editors, to whom he gave a free hand. His correspondence with the foremost of his contemporaries was untiring. He had, it is said, a benevolence of manner suited to the philanthropy of his mind, and his features in old age betokened, not only benevolence, but serenity and conscious power. I have come across a sketch of him as he appeared in old age which is so lifelike that I cannot resist the temptation of quoting it: "His apparel hung loosely about him, and consisted chiefly of a grey coat, light breeches, and white woollen stockings, hanging loosely about his legs, whilst his venerable locks, which floated over the collar and down his back, were surmounted by a straw hat of most grotesque and indescribable shape, communicating to his appearance a strong contrast to the quietude and sobriety of his general aspect." He had gathered about him many friends and admirers, and led at his country place, Ford Abbey, and before that in Queen Square, Westminster, the typical life of a philosopher.

Austin and Analytical Jurisprudence.—Austin and his gifted wife also lived in Queen Square, almost next door to James Mill, the historian of British India and father of John Stuart Mill; and their windows overlooked the garden of Jeremy Bentham, who was one of their very intimate friends. Bentham never attempted, and Austin did not attain, any success at the Bar. So far as immediate fame and the usual rewards of prominent ability are concerned, Austin's life was a failure. This was partly due to his constitutional methods of work and partly to debility. Lord Brougham is reported to have said of him that if Austin had had health, neither Lord Lyndhurst nor Brougham himself would have been Chancellor.

Austin is the foremost of the analytical jurists, and he continued Bentham's work. What is meant by "analytical jurisprudence" is perhaps best seen from a passage in Austin's outline of his course of lectures where he says that, having determined the province of jurisprudence and distinguished general from particular jurisprudence, he intends to "analyse certain notions which meet us at every step as we travel through the science of law." He then proceeds to give a list of the leading notions to which he refers—a list which may be compendiously described as the main contents of most legal systems of maturity. The terms "legal right" and "legal duty" are in the list, amongst many others, but do not there

hold the prominent place with which you are familiar in the lectures which you have studied—lectures intended to determine the province of jurisprudence, to indite, in fact, the mere prolegomena of the work which Austin had in view. The terms "command," "duty" and "sanction," "positive law" and "positive morality," "sovereignty" and "independent political society," which are analysed in those lectures, are now commonly used by educated men in the senses which Austin put upon them. If we are now sometimes at a loss to comprehend the vehemence with which he insisted on seemingly obvious matters, and the extraordinary iteration with which he pressed his points home, we may, I think, find the explanation in the extreme thoroughness with which his work was done. The battle against confusion of thought and mere mysticism was incompletely won; and what was seventy years ago only to be gained by keen controversy, is now in the quiet possession of all educated men.

Analytical jurisprudence did not, of course, end with Austin, and indeed if any one made such a suggestion, you would immediately contradict him by referring to the admirable treatise on the elements of law by Sir William Markby, in which the method of analysis is extended to "ownership," "possession," "easements," "security," "prescription," "liability" and "succession." The view that I wish to put before you is to the contrary effect. I would distinguish two further movements in English jurisprudence since Austin's work ceased: analytical jurisprudence has been supplemented by historical, or comparative, jurisprudence, and all three appear to me to have merged in scientific jurisprudence in a sense which I shall presently explain. These movements notwithstanding, I hold that analytical jurisprudence will always be indispensable. No science can make assured progress until it has acquired an accepted terminology. Analytical jurisprudence stands to the rest of the science in the relation of the definitions in an enactment to the body of the Statute, or of a General Clauses Act to the body of the Statutes at large. It maintains coherence and accuracy in discussion by attaching consistent meanings to the terms employed, and for this reason, if for no other, must always occupy the front rank in any scheme of legal education.

Comparative Jurisprudence.—Analytical jurisprudence, as I have just implied, may be distinguished from comparative jurisprudence, and comparative jurisprudence from historical jurisprudence; but comparative jurisprudence, in the more restricted sense of the term, is very closely connected with analytical jurisprudence, while historical jurisprudence, largely understood, is the forerunner of comparative jurisprudence in the largest sense of that phrase.

Austin has very clearly defined what he means by "general jurisprudence" in a passage in his third volume. "I mean," he says, "by 'general jurisprudence' the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law, understanding

by systems of law the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction." This definition would leave out of account the whole of our customary law, but you will observe that it implies the comparison of mature systems such as that of the Roman law and of the laws of England, France, and Prussia, because without such comparison it would be impossible to decide what the common elements are. This, then, is the restricted meaning of the expression "comparative jurisprudence"—the comparative study of mature systems of law. I think the idea that Austin had of the utility of this study was that it would facilitate the codification of law amongst western nations. I do not think the scientific use of such a comparison to which I shall presently advert ever occurred to him; perhaps at the time he wrote it could not have occurred to any one.

Comparative jurisprudence in the restricted sense is no more to be discarded than analytical jurisprudence. It is, or ought to be, a powerfully energetic motor in the machinery for the improvement of the laws of the West. Where societies stand at the same general level of civilisation, it is obviously extremely useful for the purposes of enlightened legislation to ascertain in what way the same problems have been handled by the Courts and Legislatures of such societies in different parts of the world.

But in Indian legislation it would be most dangerous to rely exclusively on comparative jurisprudence in the restricted sense of the term. It is easy, only too easy, to assume that rules upon which all the greatest of the advanced nations are substantially agreed must necessarily be suitable for a country of enormous diversity, where different tracts or provinces stand at very different degrees of development; where some tribes, indeed, are not removed from barbarism, and many others, were it not for us, would, to use a phrase which I have elsewhere borrowed from Sir Alfred Lyall, still stand in the pre-feudal stage. Putting aside procedure—the first necessity in any attempt at the regular administration of justice—and criminal law—the first necessity in any attempt to curb the reckless and ruthless violence of primitive man—it has always seemed to me that the acceptance of any rule of law by an advanced western nation affords a presumption, not for, but against the suitability of the rule to this couutry. The presumption may be rebutted by showing that in essentials the circumstances are the same; but ordinarily the circumstances are not the same, for the simple reason that the two societies stand in different planes of development.

—— **Its Wider Sense.**—Comparative jurisprudence, in the wider sense of the term, includes the comparative jurisprudence which is a corollary of Austin's system, and it includes a great deal more. In the wider sense, comparative jurisprudence stands on the same footing as comparative philology, comparative mythology, and comparative politics. "We shall," said Sir Henry Maine, in describing what he meant by comparative jurisprudence, "examine a number of parallel phenomena with the view of

establishing, if possible, that some of them are related to one another in the order of historical succession. I think," he adds, "I may venture to affirm that the comparative method, which has already been fruitful of such wonderful results, is not distinguishable in some of its applications from the historical method. We take a number of contemporary facts, ideas, and customs, and we infer the past form of these facts, ideas, and customs, not only from historical records of that past form, but from examples of it which have not yet died out of the world and are still to be found in it."

Analytical jurisprudence and that kind of comparative jurisprudence which is its immediate offspring are indeed scientific in the same sense that Euclid is scientific or the pure political economy of Ricardo or of parts of the treatise by John Stuart Mill. Certain postulates are taken for granted, to certain terms definite meanings are annexed, and a coherent body of doctrine is built up which commands assent so long as we do not challenge its first principles. But the comparative method as described by Sir Henry Maine is scientific in the same sense that the methods of biology are scientific. Indeed, if in the passage I have quoted we substitute for "facts, ideas, and customs" the famous words "genera and species," and for "historical records" "the geological and embryological records," we have, I think, an accurate description of a part of the actual method of biology.

—— **A Branch of Sociology.**—This passage in Maine's *Village Communities* leads us to the very portal of sociology, but the threshold is not passed. In later writings Maine foreshadowed a new science which would include jurisprudence, but to which he did not give a name. It is, however, but a step from the point to which Maine leads us to say that the science of jurisprudence must henceforth be regarded as a branch of the science of sociology. The theory of legal evolution—that is, a set of consistent generalisations from known facts in the growth of legal institutions and ideas—is, of course, as yet only in the making; but even in its present rudimentary condition we can see that it necessarily forms a part of the theory of the evolution of society; and towards that theory perceptible advances have been made in many quarters in our own day.

I hope I have made clear the affiliation of the various studies which may be grouped under the general name of "jurisprudence." Analytical jurisprudence generates comparative jurisprudence of the first kind; historical jurisprudence, touched by the electric current of modern science, generates comparative jurisprudence of the second kind; and all—analytical, historical, and comparative jurisprudence—combine to form scientific jurisprudence considered as a branch of sociology.

Nothing, I may observe in passing, is more striking than the fruitfulness of scientific ideas in generating their like. As I said in a line of Horace at the beginning of this paper, "Captive Greece led captive her conqueror"; and though in one sense the position is reversed here because British rule

has brought with it British literature, yet in another sense it is directly to Indian influences on the West that we owe the latest developments of jurisprudence. The study of Sanscrit gave birth to comparative philology, and it is to comparative philology that we owe comparative jurisprudence in the wider sense of the term.

The Tributaries of Scientific Jurisprudence.—As to the connection between the studies to which I have referred and the manner in which each aids the other, I would say that analytical jurisprudence is the anatomy of fully developed systems of law, while scientific jurisprudence, largely understood, is the biology of the legal institutions of mankind. Scientific jurisprudence can no more dispense with analysis than biology can dispense with the structural investigation of the existing forms of animal life. Comparison of one institution with another or of the same or analogous institutions in different countries and times is indispensable if we would arrive at any conclusions as to the order and nature of the evolution of laws and legal ideas. Historical jurisprudence examines the laws of one particular country or empire, such as that of Rome, with the object of explaining their successive acceptance or enactment and connecting them with other historical facts; or it takes one particular branch of the law of a given country, such as the criminal law or the constitutional law or the law of real property, and, with a similar aim, traces that from its origin to its present condition. Comparative jurisprudence, in the wider sense of the term, compares the legal institutions of different countries and times for the purpose of discovering the laws of their growth. Thus both comparative jurisprudence, in the narrower sense of the term, and historical jurisprudence subserve the purposes of comparative jurisprudence in the wider sense of the term, and therefore of scientific jurisprudence at large, because they provide those means of comparison upon which the progress of the science depends. In this way all these kinds of jurisprudence—analytical, comparative, historical—are tributaries of the great stream which I have called scientific jurisprudence at large; and, like your five rivers before they unite in the Indus, they independently fertilise wide spaces while on their course to join that combined flood which is used, and will be more and more used as time goes on, in ever-expanding fertilisation.

Austin's Definition and Customary Law.—You will notice that in all I have said I have not forgotten Austin's definition of jurisprudence as the philosophy or science of positive law, though I practically include in the term "positive law" much that is not the command of a political superior, and that would, by a strict application of Austin's terminology, be described as positive morality. You are probably familiar with the criticism of Austin's definition of positive law, that except by an extraordinary straining of language—in the course of which we should have to bring into play s. 5 of the Punjab Laws Act and the decisions of the Chief Court—it cannot be made to cover the customary law that we have here in the Punjab. The most that could

be said is that the rules of Punjab customary law are the commands of the Sovereign because the Courts will enforce them when they can be ascertained. In this and similar difficulties, where there are practices corresponding to laws but no independent political communities, no sovereign, no commands enjoining generally acts or forbearances of a class, we may, I think properly seek the aid of comparative jurisprudence in the narrower sense of the term. Wherever in the analysis of a mature legal system you find any subject or institution such as—to draw our illustrations from our Punjab Laws Act—succession, betrothal, marriage, adoption, guardianship, gifts, partitions, or the family, it is a perfectly legitimate process to take the analogous subject or institution in the practices of primitive or barbarous tribes, or of feudal or pre-feudal societies, and to examine that as a proper subject of scientific jurisprudence. You may very likely find the practice mixed up with religion, and it will probably be an expression of whatever fills the place of morality at the time; but we know that the strands of ideas, like the stems and branches and the leaves and flowers of plants, become unfolded and separated as they grow; and the mere fact that a specimen of some archaic usage may be buried in extraneous matter, which has to be cleared away before it can be fully examined, in no way detracts from the scientific value of the find.

The Science of Legislation.—Scientific jurisprudence has, of course, another aspect, in that it is the handmaid of legislation. There is not only the science of legal institutions as they now exist, and as they have actually existed, on the face of the earth; there is also the science of law as it ought to be, otherwise called the science of legislation. I merely mention this to mark off one limit to my present remarks. I am not discussing in this paper the science of law as it ought to be, which is a chapter in ethics, just as the science of legal institutions as they exist or have existed is a chapter in sociology. I will limit myself here to two observations. First, I believe that the chapter of sociology, when elaborated, will facilitate the re-writing of the chapter of ethics. Secondly, I anticipate that the effect of the one re-written chapter on the other will be briefly this: that the theory of utility will be supplemented and corrected by the theory of social progress.

Furthering the Study in the Punjab.—It is, however, certainly a part of my present object to enquire what we can do in the Punjab to further the cause of the science of jurisprudence as described and limited above. I would point out that something has been done already, and a good deal of it, as it happens, by my predecessors in the office of Vice-Chancellor. The Kangra Settlement Report of your first Vice-Chancellor, Sir James Lyall, is a mine of information on primitive customs and ideas. Mr. Baden-Powell, your second Vice-Chancellor, has published a work of extraordinary research on the Indian village community. Sir William Rattigan's digest of our customary law is, I think I may venture to say, the most comprehensive

and, for the practical work of the Courts, the most useful of all the compilations on that subject; he has, moreover, written a learned work on jurisprudence which is a text-book in this University. Mr. Elsmie, in his notes on crime and criminals on the Peshawar frontier, has adduced facts of considerable sociological value. It is, I believe, generally admitted that of the codes contained in the Punjab Customary Law Series none surpasses the code of the Ludhiana district which Mr. Gordon Walker prepared. Finally, Sir Charles Roe, in his *Tribal Law in the Punjab*, has summed up the present position with reference to our customary law as it appears to the highest judicial authority. In all these books there is something, and in many of them there is much, for the student of jurisprudence considered as a branch of sociology.

The Society of Comparative Legislation.—Now, I do not think it is by any means a mere coincidence that most of your Vice-Chancellors have made these contributions to the materials which scientific jurisprudence has to compare. I think the fact is due to the actual nature of our opportunities, and that it suggests to us a line of research in which I, for one, should heartily rejoice if our University acquired a good name. I would ask attention to a paper to which most of you, without very much trouble, will be able to refer. At pages 904 to 911 of the *Gazette* of India for November 9th, 1895, you will find the prospectus of a Society of Comparative Legislation which originated in proposals by Sir Courtenay Ilbert, and obtained the support of the Lord Chancellor, the Lord Chief Justice of England, and many other eminent men. This Society proposes to apply to jurisprudence the comparative method of investigation, and is intended to be of service to legislative bodies, to practising lawyers, to jurists, and to students of sociology. "In India alone," so the prospectus runs, "which is at once, to cite Sir Henry Maine's language, 'the great repository of verifiable phenomena of ancient usage and ancient juridical thought' and the scene of some of the most interesting modern experiments in legislation, is a limitless field for work such as the Society seeks to promote. There ancient and modern codes co-exist. In customs and usages still observed are legal conceptions of which in the western world are only obscure traces; and the meeting of several diverse systems of law has given rise to problems akin to those which in the decline of the Roman Empire arose from the contact of its law with the customs and laws of other States." This shows you what, in the opinion of some very competent judges, our opportunities are. I hope we shall continue to make good use of them; and if we do, I venture to anticipate some benefit to the causes alike of science and of sound legislation in India.

The Practical Value of Jurisprudence.—Finally, I would say to those of you who are pursuing or who have just completed the Law School course, do not leave jurisprudence behind you as you enter on the actual business of life. The muse of jurisprudence is no crabbed or idle one. She can

offer intellectual satisfaction, more especially to those who can find pleasure in abstract ideas and abstract reasoning, but are repelled by the mysticism of some philosophies which move in an ever-recurring cycle from mere assumption to mere scepticism, and which do not, after all, lift even one corner of the dark veil for ever drawn between humanity and the ultimate problems of life and mind. Far more than a means of intellectual satisfaction, jurisprudence from its effect upon the science of legislation has immense value in practical affairs. By the Courts and by the Legislatures law is ever in the making; and though judges and legislators are mainly guided by the actual requirements of the particular case or country and by the sagacity which they derive from habitual occupation in public business, the success of their efforts in making the law will surely in great measure depend upon the soundness of their views on social and legal progress and the firmness of their grasp upon that science of legislation which is related to the science of jurisprudence as I have explained.

Its Moral Aspect.—I have said nothing definite as yet on the moral aspect of the study, partly because that aspect is so obvious that a very few words will suffice, and partly because I did imply some allusion to the matter in the sketch I gave you of Bentham's life and personality, thinking as I made the sketch that, in the cause of morality, the example of such a benevolent sage as Bentham is far more precious than any lengthy discourse. I am afraid that lawyers as a class have no enviable reputation for benevolence, and that there is at least one proverbial description of them which suggests that they are rather the enemies than the friends of mankind. No doubt in all professions men are to be found who prefer their private advantage to everything else, and have no regard for the well-being of society except so far as it affects themselves. But if there are such men in the legal as in other professions, this should not blind us to the fact that the aim of all law is the prevention or mitigation of human suffering. If it is the object of medical science to check or alleviate physical disease or infirmity, it is no less an object of the science of jurisprudence to suggest the means of saving the innocent from those injuries which are habitually threatened by what is evil in the nature of man.

Jurisprudence, indeed, and justice and mercy are three sisters; jurisprudence is the wisdom and mercy the grace of the law; and from underneath the place where these three are enthroned flow out continually the healing waters which, in proportion to the strength, the skill, the courage, and the honesty with which they are directed, redress the grievances, right the wrongs, or overwhelm the iniquities of mankind.

CRIMINAL LAW IN NEW SOUTH WALES.

[*Contributed by* W. F. Craies, Esq.]

Consolidation.—By the Crimes Act, 1900 (Act No. 40 of 1900), the Legislature of New South Wales has effected a consolidation of the Criminal Law and procedure of the Colony, both as to indictable offences and as to many offences punishable on summary conviction (Part XIV.). This legislative effort is less ambitious than that of Queensland,[1] since its aim is consolidation only, and not codification, and since no attempt has been made to include or supersede the whole of the Common Law of England as to crime. But the new Act supersedes the whole or portions of twenty-three colonial Acts. In some instances English Acts which applied to the Colony are repealed in part—*eg.*, 36 Geo. III., c. 7, and 57 Geo. III., c. 70 (s. 11); but with this exception, the English law of treason, as declared in the Treason Act, 1851, though not included in the Act, is expressly kept in force (s. 16).

An Example for England.—The substance of the Act very closely resembles that of the English law, and its form shows that a great deal might be done on the same lines in England without finding it necessary to codify the law in the proper sense of that term. But there are a good many modifications which show that colonial Legislatures are quick to adopt changes or reforms which at home do not pass beyond the stage of discussion. Thus ss. 9 and 10 depart from English law by defining felonies as offences punishable by death or penal servitude, and misdemeanours as offences for which no greater punishment can be awarded than imprisonment or whipping, or fine with or without imprisonment. The effect of these sections, taken with the provisions as to the punishment of particular crimes, is to make perjury (s. 344) and certain forms of conspiracy (s. 327) felonies.

Offences against the Person—Murder, Infanticide.—Part III. is, in the main, a transcript of the Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), but contains many variations from, and additions to, the English Statute Law. Murder is defined as committed "where the act of the accused, or thing by him omitted to be done causing the death charged,

[1] Journal, N.S. vol. 2, p. 555.

was done or omitted with reckless indifference to human life or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit or during or after the commission by the accused or some accomplice with him of an act obviously dangerous to life or of a *crime punishable by death or penal servitude for life.*"

This definition pretty closely follows English legal decisions, but the words italicised at the end get rid of the somewhat disputable doctrine that murder is committed by a man who kills another, however inadvertently, in the commission of any felony.

S. 21 attempts to meet the difficulty felt in dealing with charges of infanticide.

> Whoever being a woman delivered of a child is indicted for its murder shall, if the jury acquit her of the murder and specially find that she has in any manner wilfully contributed to the death of the child, whether during delivery or at or after its birth, or has wilfully caused any violence, the mark of which has been found on its body, be liable to penal servitude for ten years.

False Pretence.—The difficulties felt in England in consequence of the legal definition of false pretences (see *Reg.* v. *Gordon*, L.R. 23 Q.B.D. 54) are to some extent met by s. 179, which punishes the obtaining of property (with intent to defraud) partly by a false pretence and partly by a *wilfully* false *promise.*

Punishments—Whipping.—The modes of punishment permitted in the Colony closely resemble those known to the English law. But sentence of death may be passed, not only for treason and murder, but also for rape (s. 63) and for felonious assaults on girls under fourteen (s. 67), and occasionally capital punishment is inflicted in the case of gross offences of kinds last specified. Whipping may be ordered in the case of all males under sixteen convicted on indictment under the Act (s. 434), and may be inflicted on adult males, in the case of a good many offences not so punishable in England (s. 435); and persons convicted for felony attended with violence to the person, or under arms or by threats, may be sentenced to be kept in irons during part of their term of punishment (s. 436).

Appeals.—The provisions as to criminal appeal closely resemble those in force in England. But there are certain differences, all improvements. Thus, in lieu of the fiat of the Attorney-General, an order of the Supreme Court is necessary for a writ of error (s. 471), and new trials may be ordered by the Supreme Court in all cases of misdemeanour and not merely in those actually removed to the Court for trial (s. 474), and a Crown case *must* be reserved if applied for before sentence by counsel for the defence (s. 428).

Doubts as to Guilt—Enquiry after Conviction.—S. 475 provides for an enquiry after conviction in the event of doubts arising as to guilt, etc.

In view of a recent discussion as to the proper mode of dealing with such matters, the section is set out verbatim :—

475. (1) Whenever, after the conviction of a prisoner, any doubt or question arises as to his guilt, or any mitigating circumstances in the case, or any portion of the evidence therein, the Governor on the petition of the prisoner, or some person on his behalf, representing such doubt or question, or a judge of the Supreme Court of his own motion, may direct any justice to, and such justice may, summon and examine on oath all persons likely to give material information on the matter suggested.

(2) The attendance of every person so summoned may be enforced, and his examination compelled, and any false statement wilfully made by him shall be punishable in like manner as if he had been summoned by, or been duly sworn and examined before, the same justice, in a case lawfully pending before him.

(3) Where on such enquiry the character of any person who was a witness on the trial is affected thereby, the justice shall allow such person to be present and to examine any witness produced before such justice.

(4) Every deposition taken under this section shall be stated in the commencement to have been so taken, and in reference to what case, and in pursuance of whose direction, mentioning the date thereof, and shall be transmitted by the justice before whom the same was taken, as soon as shall be practicable, to the Governor, if the enquiry was directed by him, or the judge directing the enquiry, and the matter shall thereafter be disposed of, as to the Governor, on the report of such judge, or otherwise, shall appear to be just.

The section, it will be seen, does not affect the prerogative of mercy, and merely regulates the mode of obtaining and sifting the materials necessary to enable the Governor and his advisers to decide whether it should be exercised.

THE VITALITY OF ROMAN-DUTCH LAW.[1]

[*Contributed by* T. Berwick, Esq.]

Mr. Craies's Proposal.—On the waters of the highway to our possessions in the furthest East and the extremest South; on that route which, more than any other on our little earth, is charged with a constant succession of evidences of the ubiquity and power of the British Empire, and where, therefore, one is most tempted to glory in being a son of that empire and to desire its unification in every particular, I have found leisure to occupy myself with an article which, under the title of "The Law of South Africa," appeared in the August number of the *Journal of Comparative Legislation.* It contains a proposal calculated, I believe, to make the task of pacification in South Africa more difficult, to add further bitterness to the loss of political independence, and so greatly to hinder or delay real Imperial unity. The proposal is this—that we should forthwith force on the people of the late South African Republics, mainly, I apprehend, for the commercial conveniences of their conquerors, the subversion of their whole system of laws and their own venerated maxims of justice, on which depend every right and obligation in the private relations of life.

The proposition advocated is summarised in the following sentence: "The undesirability of permitting the continuance in South Africa of so much of the Roman-Dutch law as has survived legislation"; and the reason advanced in support of the summary extinction of that system of jurisprudence—which is far more truly the birthright of all the Dutch inhabitants of South Africa than is the Common Law of England the birthright of the present inhabitants of most of the States and Colonies originally founded by the English—is that its continuance "would perpetuate unnecessary difficulties in the administration of justice."

I propose to examine the true measure of each of these difficulties and the objections generally to the continuance of the Roman-Dutch law as these are set out in the article above referred to. Some of them need but brief comment.

The Argument from Ceylon.—We are first informed that in Ceylon it has

[1] This article was written by Mr. Berwick on board ship on the way out to Ceylon, and was received by the Editors from Colombo. Mr. F. H. M. Corbet and Dr. W. R. Bisschop have kindly added some notes.

been "the parent of much unwholesome uncertainty." I have an impression that most of us have probably heard before of the "glorious uncertainty of the law" as a thing which is generally believed to flourish more rankly in England than in any other soil; but I have not yet heard it seriously proposed that therefore the whole of the English Common Law which has survived legislation should be swept away, which, *mutatis mutandis*, is the heroic remedy gravely suggested by a former judge of that Colony, Mr. Justice Clarence, whose authority is cited in the article. The same ex-judge is quoted as having said that "as the Dutch lines recede further into the past, the doctrines of the Roman-Dutch law of the past century become less and less applicable to the present conditions of life." But it does not seem to have occurred to his mind that the present conditions of life in England also are not exactly the same that they were in the past century, and that, nevertheless, it has not been deemed desirable to abolish the whole Common Law of England at one fell swoop in order that law may keep pace with the changing order of things. Reference is also made to "remnants of procedure originally founded on Dutch institutions, no longer extant, which still linger [in Ceylon] to hamper and confuse the administration of justice." In point of fact, Ceylon has its own special Codes of both civil and criminal procedure, and Mr. Clarence's remark on this head must therefore have had reference to past times. Had it been otherwise, however, it would have had no bearing whatever on the question of the advantage of substituting any other system for the Roman-Dutch law in South Africa, for the plain reason that procedure stands on a quite different footing from substantive law, and is, in fact, constantly altered and adapted to new views or needs in the matter of practice.

Old-World Barbarities.—Touching the subject of criminal jurisprudence, no one in these days would seek to extenuate the cruel punishments and methods of investigation of alleged crimes by torture permitted a couple of centuries ago by the Dutch law, and long since unknown to its practice. But neither can any educated person be ignorant that precisely the same barbarities then prevailed in England and throughout all Europe; and so far as any argument is insinuated on that score, it might here again be as reasonably contended that the whole law of England of to-day should be now abolished because of the very same cruelties and methods of examination by torture having once (and that not so very long ago) prevailed there. There is no pretence for saying these methods of procedure had their source in the *Roman-Dutch* system of jurisprudence. As little ground is there for the sarcasm that the only thing which is clear about the Dutch law of crimes is that justice is not administered according to the laws of Moses.

The Dutch Law of Crime and the Common Law.—A well-known learned South African judge is quoted as having spoken of the uncertainty and want of precision which is said to characterise the Criminal Law of Holland. If,

however, a comparison is to be drawn between it and the Common Law of England, the advantage, so far at least as substantive law is concerned, must appear to an impartial mind acquainted with both systems to rest with the former, which in many respects has been far in advance of the other. Probably the law of no country in Europe has been so slow as that of England in recognising crime as chiefly a matter of public concern and something more than a private wrong, and none slower in putting its punishment on a just footing as between class and class—noble and peasant, literate and illiterate. For example, it was, comparatively speaking, but the other day that an approximation was made in England to the Scotch and Dutch (perhaps, to be accurate chronologically, I should say Dutch and Scotch) institution of public prosecutors, and no great time since a man might after conviction plead the benefit of clergy. From whatever cause or causes, so inadequate has the English Common Law proved in this department of juristic science that there is scarcely a fraud, or indeed any form of crime, to meet which it has not required to be supplemented by statutory enactment—*e.g.*, the obtaining of money or goods by false pretences, frauds by trustees, bailees, etc.—all which fall within the Civil Law definition either of *Furtum* or *Stellionate*, and were always punishable by the Roman-Dutch law, and so needed no Statute to make them so. This law, moreover, is free of the wholly barbarous distinction between felonies and misdemeanours, with all the anomalies and absurdities surviving from feudal times which that distinction imports. It may fairly be said that in all that pertains to the substantive law of crimes the Roman-Dutch law is as superior to the English Common Law as the cumbrous English Statute Law, in the results it has at last attained, by painfully tedious and halting steps, is superior to the latter; while it lacks the confusion, inconvenience, and difficulties in the administration of justice occasioned by the multiplicity of Statutes that clog the law in England, and prove to the tyro (and others as well) as the veritable haystack of the proverbial needle. English Criminal Law has been the casual growth of expediency and opportunity: the Roman-Dutch law is the heir of principles—or, rather, of an organic and digested body of principles—which needed little legislation to apply them to emergent cases or to new forms of criminal development.

More worthy of consideration are the allegations (1) that the law which the Dutch colonists brought with them from Holland is sealed up, if I may put it so, in books written in a tongue or tongues beyond the comprehension of modern students and law practitioners; and (2) that there is an absence of ready means of determining how much of it was applicable to the circumstances in which the original colonists found themselves, and was therefore carried by them to their new settlements.

(1) **The Impediment of an Unknown Tongue.**—The difficulties arising at the present time from the language in which the Dutch jurists wrote their treatises on the substantive law (for I need not speak of obsolete

works on *praxis*)—some in Latin, some in Dutch—have, however, been greatly exaggerated even in Ceylon, where Dutch has ceased to be spoken, and still more so in South Africa, where, although colloquially somewhat corrupted by natural provincialisms, it is essentially the language of the country; and one can hardly suppose that it is not read and understood in its purer form by the educated classes who have any part in the administration of the law. The most practically useful of these treatises have been translated into English; and in the Transvaal, as the writer of the article under review himself mentions, the Courts are bound to regulate their decisions by the law laid down in these very text-books. Further, in the ordinary course of things, during the nineteenth century the several Colonies or States of South Africa have already accumulated in their published reports of decided cases and in their legislative enactments or ordinances—all, of course, in the language of the country—a body of law sufficient for their ordinary requirements, and day by day maturing more and more as an independent and self-contained offshoot from the parent stem by a process identical with what took place in Holland itself and other countries which also found the basis for the most part of their Common Law directly in Roman jurisprudence bent to meet the needs of their special environments, and expressed, not in Latin apostrophised as "mediæval," but in the ordinary language of the country. If we desire a particularly apposite example at our own door, we have it in Scotland, where also the general law is founded on the Roman Civil Law, and whose jurisprudence stands in a most intimate relationship to Roman-Dutch law; where, therefore, an education in Roman jurisprudence is necessary to its intelligent appreciation; and where also the Roman law (in the application of its principles) is still avowed to be the law of last resort should necessity arise, though in such a thoroughly matured system it is but rarely, if ever, that a direct appeal to that fountain has to be made by judges and advocates, none of whom are unfamiliar with the Latinity of the *Pandects* and *Institutes*—the latinity, not of mediæval, but of classic times. When it is added that in the Dutch Colonies it is only in exceptional cases outside the great bulk of common litigation that it is necessary to prosecute research into the Latin works of the jurists of the seventeenth and eighteenth centuries, it will be obvious that the difficulty of language is reduced to very narrow dimensions, which are getting narrower every day.

It is not to be denied that in such a complexus as any developed system of law forms—and especially the Roman Digest, wherein nothing has arisen haphazard, but a purposed, scientific and logical interdependence of all its parts exists—incongruities, discords, and disturbances of law in widely separated chapters, and sometimes almost insoluble problems, are apt to arise in this process of growth when fragmentary patches of some foreign system are foisted into some branch of law by judges, either through ignorance or want of reflection on how other parts of the complexus will be affected.

This has happened, notably in Ceylon, where the law of mortgage (taking that for an illustration), which in England is based on entirely different and far more complicated (though more ancient) conceptions than those that prevail in the later Civil Law, has been thrown into confusion by such judicial blundering; but nothing of this is due to, or to be condoned by, the language of the text-books, for these, as already said, have been translated into the language of the administrators of the law, some of whom, sent out from England to administer it, have been apparently unable to seize the simple notion of the possibility of holding or having a right in property merely as *security* for a debt, and not under a sham title of ownership, so clouded were their judicial perceptions by the very primitive idea of an absolute transfer complicated and cumbered with the doctrines of equitable redemption on which they had been nurtured.

The Supposed Difficulties of Research.—Neither is it to be denied that it is sometimes necessary for those concerned wiith the right administration of the law to make research into such works as those of Voet, Matthæus, or Heineccius in Latin, Pothier or Domat in French, etc.; but here, too, the stumbling-block has not been that the works they had to consult are written either in so-called mediæval Latin (which is not true) or in a form of the Dutch language different from the common South African dialect. An ordinarily well-educated Africander would probably smile at the latter suggestion, and an ordinarily well-educated English lawyer's difficulty in comprehending the text of the Roman-Dutch law jurists does not really arise from their Latinity, but from the extent to which their commentaries on the ancient and expositions of the modern Civil Law are necessarily entangled with the institutions and technical language of the old *Jus Civile*, and from his own too common ignorance of that fountain of the law and justice of almost all Continental Europe. It is only natural, too, that English-bred judges trained up only in the knowledge of a system of jurisprudence so different from what they have often been sent out to the Colonies to administer should be in little sympathy with the latter, and too prone to fall back on what they already know without effort of memory or research, and which seems to them, from habit and education, the one natural solution of almost every question that arises, until a lengthened experience (and a costly one to the integrity of the law) and a study forced upon them have —as in notable cases within my own knowledge—widened their views as well as their knowledge, shaken their creed that the English Common Law is the perfection of human wisdom, and have gained their unqualified admiration, not to say enthusiasm, for the modern Civil Law. That which, like Balaam, they essayed to curse, they have ended by blessing. It is to be feared that to the too frequent fault of a too contracted juristic education has sometimes to be added the not un-English tendency to a supercilious contempt, in exact ratio to ignorance of them, for institutions prevailing outside the narrow limits of the southern half of Great Britain. Those

"vestiges" in Ceylon of Roman-Dutch law, for instance, whose existence Mr. Justice Clarence thinks an "unfortunate incident in the substantive law of Ceylon," and of which he says that "it would be a boon to all classes of the community if they were now finally swept away"—these "vestiges" and "remnants" (as he describes them) happen to embrace, *inter alia*, the whole law of inheritance and rights of property consequent on marriage, and almost the whole law of persons, property, and contracts that regulates the affairs of some millions of souls. Some particular statutory exceptions have been advantageously introduced, in order to assimilate the law in certain matters to that of England, or, more generally perhaps, to that of the United Kingdom; but it is frequently impossible to disentangle these exceptions in their working, when they have been copied from law peculiar to England, from the all-pervading threads of the general system of law which meet one at every turn. The result is that the imported fragments will not piece in with the rest, and inextricable confusion sometimes results. Had the learned and well-intentioned ex-judge who committed himself to the above-quoted diatribe confessed that it is not the survival of the Roman-Dutch law, but ignorance of it, that has been the cause of the uncertainty he spoke of, he would have been nearer the mark. Let us imagine the case of a young man from the English Bar, who had never studied Scotch law, being appointed to administer justice from the Bench of the Scottish Court of Session. He, too, might possibly consider it would be a "boon" to himself, at least, if the Scotch law "were now finally swept away"; but one would hardly (it may be hoped) expect him to go so far as to declare and publish to the world (even if he thought it) that this would be a "boon to all classes of the community," and to the Scotch themselves in particular. I wonder me greatly how an Africander lawyer in our newly annexed territories, whose allegiance to our empire we desire to cultivate, would look if he should chance to read the above opinion and to learn that the writer of the article before me, who has quoted it to support his own views, virtually proposes to apply it right away, *mutatis mutandis*, to the whole of South Africa, if the Cape will have it, and whether his (the Africander's) own countrymen will have it or no! However desirable or undesirable such a revolution might be in itself, and however likely or unlikely it may be to eventuate in the course of years or generations, the present seems to me a singularly inappropriate time to urge immediate action for its accomplishment. And, apart from any question of national feeling, or of comparative ideal excellence of this or that system of jurisprudence, legislators and political administrators in South Africa will certainly have other and more pressing things to think of for some time to come.

(2) **Extent of Applicability.**—The only other alleged "difficulty" in the administration of Roman-Dutch law worthy of serious consideration—though why in the administration of this system of law more than any other is not very clear—is the difficulty, which certainly occasionally occurs,

of determining whether any particular rule of the law of Holland was so far applicable to the Dutch Colonies as to have been carried to them by the original settlers, and whether any particular rule, as it prevailed in Holland, has or has not been abrogated in a Colony by desuetude, or perhaps by contrary and established usage. This matter, however, needs no lengthened notice. As respects the first question, or branch of the question, the difficulty seems to me to be one not a whit different in kind, and probably far less in degree, than what might be expected to arise in any Colony which had been originally settled by the *British*—that is to say, in the great bulk of our colonial empire, with the United States of America thrown in. And the second branch of the question involves, I think, about as simple a question of fact and law as commonly engages the attention of any court of justice. In the very case cited by the writer of the article (*Seaville* v. *Colly*), De Villiers C.J. found no difficulty in laying down a very obvious and simple test or rule for its decision. And this recalls to me that, although the observation is made in the article that "the inconveniences of South African law arising from resort to a defunct system are best indicated by reference to the opinions of South African jurists," strangely enough not a single opinion of any South African jurist is cited in support of the assertion of such inconveniences (so far, at least, as concerns the law applicable to civil, as distinguished from criminal, matters).

Roman-Dutch Law in Holland.—By way, apparently, of demonstrating a supposed advantage which the substitution in the South African States of the English Common Law for the Roman-Dutch law would have, as well as of accentuating the alleged decadence of the latter, it is asserted that, so far as concerns Holland, it (the Roman-Dutch law) is there "absolutely dead" and "superseded" by a series of Codes, apparently based on the French Code, "so that there is now no living system of jurisprudence, like the Common Law of England, to which lawyers can resort for elucidation of difficulties arising under the seventeenth-century form of Roman-Dutch law which the colonists carried abroad with them." I confess that the argument is not very clear to me; but be the logic what it may, I take exception to the assertion on which it is based, which is, I consider, very erroneous, and indeed contradictory in language. Only that which *is* can be codified, and it continues to live in its codification. One might as well say that if in England the body of the English law of to-day were to be codified, it would thereby become defunct. Though I do not pretend to an intimate acquaintance with the Dutch Codes, I do know that the Code Napoléon did not destroy the foundations of the old French law, and that both the Dutch and the French largely took their systems of jurisprudence, apart from certain feudal and other customs, from the same source, and (in different degrees) came in the course of time under the same common system which grew out of the *Jus Civile* and has received the name of the "Modern Roman Law." Their divergencies from that,

in cases in which the old law in France and Holland did not entirely agree, were variations rather than generic differences, and in all that belonged to that system, both nations (unless I greatly err) have still adhered in their Codes to the principles which were crystallised in the Roman law as it was left by Justinian, kept alive in the schools of Beyrout when barbarian hordes and customs smothered civilisation for a time in Europe, and spread over the Continent after the great discovery at Amalfi.

Conservation by Codification.—Codification, with its ordinary accompaniments—consolidation of Statutory Law, unification where there are local divergencies, rectification of malinterpretations, and resolution of doubts and discrepant decisions—far from making defunct, actually conserves the existing law; in some cases, indeed, modifying or amending it, mostly by extending its governing principles to new conditions and wants which have arisen, but to an infinitely greater extent aiming at being declaratory of and at making plain the law as it actually is, and at condensing and simplifying what has in the course of ages become diffused or complicated. So much, indeed, is it a preserving and not a superseding process that one actual drawback to codification is its very tendency to crystallise the existing law, to impair its elasticity, and so somewhat to retard its natural and wholesome evolution and the ready extension of its principles to the ever-multiplying exigencies of society, as was illustrated long ago by the Twelve Tables and the necessity which thence arose for the invention of legal fictions to maintain the semblance of conformity to that very ancient Code, and for the equitable intervention of the Prætor. Codification is essentially not a constructive and not even a rebuilding process; still less is it destructive. Its special function, I repeat, is to be "declaratory" of existing, and not enactory of new, law, and its effect is to maintain the vitality and vigour of the law it codifies; and none the less when the opportunity is taken for development, with the express sanction of the Legislature, of recognised principles, in order to meet the growing needs of the times and to meet the danger just mentioned. And this, I take it, is what took place both in France and Holland through the introduction of the Codes enacted in these countries. Yea, if Grotius and Voet, Pothier and Domat, and the other illustrious jurists of the recent centuries could speak now in the flesh as they do in their works, they, I am persuaded, would not say that the jurisprudence which was the subject of their labours is "defunct" in the countries which have codified the very law they expounded—codified it with additions, no doubt, and with excision of corruptions and excrescences, and adjustment of inconvenient local variations, but without subtractions from the guiding principles that shine in the firmament of the Roman law. Rather would they have rejoiced if they could have had a part in editing the Codes which their own work made possible; and rather would they now re-echo what Gibbon expressed in words which, if my memory does not at the moment allow me to repeat faithfully, were at all events to the effect that although

Rome has long ceased to rule by its arms, it still dominates Europe by its laws.

The "Auspicious Opportunity."—A few words now on the proposition that the present time, "before representative government is re-granted," and "during a period of Crown Colony or military government," affords an "auspicious opportunity" for constituting a Commission to frame—evidently with a view to forcing, with or without their will, on the newly conquered South African States—a Code or series of Codes which shall unify the law, or the main branches of the law, in these and the adjacent self-governing Colonies in one common system of jurisprudence. Though perhaps not expressed either so succinctly or so directly, this is manifestly the tendency and drift of the proposition. And it is equally evident from the whole tone of the article that its author desires that "all that survives" of Roman-Dutch law should be eliminated from the common system. But the Common Law of England is not (he says) to be substituted for that. What, then, is to be substituted for this revolutionary *débâcle* of the laws and institutions of the people? Shades of Menes and Minos, and of Lycurgus and Solon, sustain my breath!—it is to be a "judicious selection from the laws of other countries"! Not from the laws of South Africa itself apparently; these are to be swept away; but from other countries the peoples of South Africa are to learn what is "best suited to their local needs"! Tribonian and his colleagues are considered to have accomplished a labour of herculean magnitude; but what was theirs to the feat so glibly proposed?—not a mere codification of existing laws, and that of the laws of a single nation, but the *creation* of a wholly new system of jurisprudence to serve for all the peoples of South Africa, and which is to be the distilled quintessence of all the wisdom of all the laws of all the world—except of the country where this new incarnation of justice is to appear *totus teres atque rotundus*. It is not as if its author only spoke of a common system of mercantile or of maritime or other like special branches of law, inclusive of the whole law of contracts from marriage to pawnbroking, but he expressly advocates that we should "go further" and "create a system of South African law, not by substituting the Common Law of England for the Roman-Dutch system, but by a proper and systematic creation of a series of South African Codes dealing completely and effectively with [all] the main branches of law," by the aforesaid "judicious selection from the laws of other countries." These are his very words; and there can be no doubt as to their meaning, as respects the comprehensiveness of the field he contemplates, for he establishes that by referring for illustrations to the complete Codes of France, Italy, and the German Empire. The ready acquiescence of the Dutch inhabitants of the present self-governing Colonies in the sweeping away of the last "vestiges" of their Roman-Dutch law, and the creation of a new system, which has no analogue in the present order of things in the world, is facilely

assumed, at which assumption I only smile and make no comment. The acquiescence of the Dutch inhabitants of the Transvaal and Orange River Colonies is treated with such indifference, and as a matter so entirely needless of consideration by a "military government," that it is not even adverted to. One would infer that the Boers had hitherto lived without any settled law, like hordes of monkeys or savages, instead of having enjoyed a jurisprudence based on what was and is the mine of equity for Europe, and is the actual parent of both the mercantile and maritime law of England.

The Policy of Great Britain.—Fortunately, it has ever been the policy of Great Britain, as it was of her great predecessor in empire, in dealing with conquered territory (and I now quote the words of the author of the article himself, incongruous as they are with his suggestions), "to interfere as little as possible with the existing laws and customs of the inhabitants of the territory." There is not the remotest probability of this policy being departed from now. Then, *cui bono*, it may be asked, the present discussion of a suggestion which has no likelihood of being adopted? Perhaps not much, except to discourage the agitation of proposals the mere mention of which can only tend to aggravate racial discord, and which, if we could imagine them given effect to, would be justly resented as an insulting and brutal exercise of power, which, instead of promoting unity, would for many a long year make more difficult and tedious the task of reconcilement.

Gradual Assimilation.—I do not wish to be misunderstood. I believe that the assimilation to some extent, probably within the time of the next generation, of the laws of all British South Africa—not merely of those which concern the fiscal, postal, and other great heads of executive administration, but of the laws concerning private rights—is as inevitable as it is desirable for the convenience of all the component provinces, States, or however we may designate them, whether federated, as we hope for, or not; and this partial assimilation will progress *pari passu* with the march of their several conveniences and mutual necessities; but it will not be accomplished at a single *coup*, and it will not be hastened by offending the national susceptibilities of a sturdy race as deeply attached (and with reason) to their own institutions and laws as an Englishman is to his, and far more stubbornly pertinacious in all their sentiments, prejudices, and resolves. For the matter of that, an assimilation is to be anticipated, to some degree, of the law throughout the whole empire in matters of most obviously common concern, and so far as may be suitable to every environment. But as respects an entire unification of all the main branches of law, whether throughout the empire or even within the narrower bounds of British South Africa, the aspiration of this is the veriest Utopian dream.

The Analogy of England and Scotland: A Forecast.—For the present, at all events, and for a long time to come, the different portions of British Africa will jog along in the same way that such close neighbours as England

and Scotland have done so very well ever since their union under one Legislature as well as one Sovereign, in spite of their having retained their separate laws for regulating private rights, and their in many respect distinct, not to say antagonistic, systems of jurisprudence, derived for the most part from totally different sources, and which, even in such corresponding parts of the respective systems as do have a distant common origin, take very different shapes. The two countries may perhaps have got on together all the better from the very fact that a considerable amount of Roman law entered into the composition of the judge-made Common Law of early England, as well as, notoriously, into its later equity jurisprudence, though in the former in a terribly corrupted as well as fragmentary condition, owing to the crass ignorance of the ecclesiastics to whom the chief administration of justice was committed in olden times, who strove both to supplement from an imperfect knowledge of the Roman Civil Law, and to soften, the scanty and savage customs which the Saxon and Scandinavian tribes in England inherited from their barbarian ancestors together with the rites of Thor and and Woden.

As far as concerns the extinction—the murder—of Roman-Dutch law compassed by the Ceylon ex-judge quoted by the writer of the article I am reviewing, assented to by the latter, and tacitly included by him in his plan of revolution of South African law, they might as well seek to change the orbit of the earth as to terminate the dominancy in any country of any offshoot of the Roman Civil Law which has once established itself there, or to destroy the living influence of that CORPUS JURIS wherein are enshrined the eternal maxims of universal equity, and in which every branch of law has a place and is dealt with on principles of reason and justice whose capacity for evolution and for extension to all progressive developments of human society is unbounded.

I will conclude this critique with one pertinent question. The proposed unification, provided it were not a "judicious selection from the laws of other countries," but a frank adoption of English law, would doubtless be of great convenience to a few English lawyers and their English clients, —as, for that matter, would be also the still more ultra-Utopian unification of the laws of the whole world, on, of course, an English basis! Is it the millions of people in South Africa whose laws it is now seriously proposed to revolutionise wholesale by the extinction of the Roman-Dutch law, or a few individuals in England that would benefit mostly by the change? Is it the convenience of these or of those that has suggested it?

PS.—Within a few days after my arrival at my destination and after this paper had been written, a public telegram was received there containing the intelligence that Mr. Chamberlain had announced in the House of Commons that (as was indeed to be expected) the existing laws and institutions of the newly annexed States are to be respected, and their administration committed as far as they safely can be to the Africanders themselves; and further, that this announcement had been cordially approved by all parties.

DEVELOPMENTS OF MODERN DUTCH LAW.

[The following commentary of Mr. W. R. Bisschop LL.D. (Leiden), contributed by way of notes to Mr. T. Berwick's article, is so instructive that the editors publish it as a supplementary article.]

Codification in Holland.—The want of codification made itself felt in the seven United Provinces before the French Revolution, and the commentaries, systematic digests, and the institutes of learned lawyers during the latter part of the eighteenth century may be taken as so many private endeavours to systematise the usages and customs of the different provinces. As soon as the Revolution of 1795 had overthrown the existing state of affairs and had practically made an end to provincial autonomy, the National Assembly resolved that one complete and general law should be introduced for the whole country, as well in *civilibus* as for criminal matters. This resolution was never carried into effect.

The first official attempt at codification was made in 1798, when a committee was appointed to draft a Civil and a Criminal Code, as well as a Code for Civil and Criminal Procedure for the whole of the republic. The committee set to work, but before they had finished their task a new form of government had been introduced; the work was retarded, and this was to a great extent due to the aversion of the different provinces to a uniform legislation for the whole of the republic. Finally on October 3rd, 1804, three Bills were read for the first time in the Legislative Assembly, viz.:—

1. General introduction to the law, in eleven chapters;
2. Criminal Code, in four books;
3. Law of Evidence, in six chapters.

It seems hardly necessary to state that these Codes only contained national law. The objection afterwards raised against them by the National High Court of Justice was not based on their contents, but on the form in which those contents were embodied. It was the didactic method to which exception was taken, and which resembled more the language of Justinian's *Institutes* than the wording of the Statutory Laws to which we have now become accustomed, and of which the Code Napoléon set the example in such an admirable way.

This should be well understood, for although, owing to the admiration felt by the legislators of those days for the exceptional law-drafting capacity of the French, it has often been the case that through imitation *la forme emporta le fond*, the French Codes have not changed in one single move the general principles of the law of the country, and thereby superseded the national institutions wholesale. Much of the specific provincial law has gone, but this would have gone with any attempt to make the law of the country uniform, and it would have done so irrespective of any foreign legislation. When J. van der Linden wrote his *Institutes of the Laws of Holland*, which may be called the fundamental Code

of South Africa, he certainly did not place on record what was considered law in every particular part of the United Provinces.

In 1805 the form of government again changed. On August 7th, 1806, Holland was declared a kingdom, and Louis Napoleon was created King of Holland. Meanwhile, the committee appointed in France by Bonaparte in 1800 had finished their work, and the 30me Ventose An XII. (March 21st, 1804)—the "Code Civil des Français," afterwards called "Code Napoléon"—received the force of law. Four other Codes ("Code de Commerce," "Code Pénal," "Code de Procédure Civile," "Code de Procédure Pénale") followed in the years 1806, 1807, 1808, and 1810.

The Code Napoléon was greatly admired in Holland, and to this admiration the rejection of the drafts of 1804 was partly due.

The King appointed new Committees in 1807 for the purpose of

(1) Drafting a Penal Code. The result of this committee's work was embodied in the "Penal Code for the Kingdom of Holland," and this Code was promulgated on February 1st, 1809.

(2) Remodelling the Code Napoléon for the Kingdom of Holland. The result of this work is embodied in the "Code Napoléon as arranged for the Kingdom of Holland," promulgated on May 1st, 1809.

The Codes of Procedure and of Commerce, though drafted, never became law. On July 9th, 1810, Holland was declared part and parcel of the French Empire (*La Hollande est réunie à l'Empire*). On November 8th, 1810, the French Codes were declared to have the force of law in those regions which formerly were the United Provinces.

After Holland had regained its independence and had become the Kingdom of the Netherlands, a special provision for the codification of its laws was inserted in its constitution. Accordingly committees were appointed, and on March 5th, 1816, the draft of a Civil Code was published, which had, however, to be revised in view of the union of the Northern and the Southern Provinces of the Netherlands. On November 22nd, 1820, the revised draft was laid before the Second Chamber of the States General.

This Code—generally called the "Bill 1820" (Ontwerp 1820)—is considered a masterpiece of scientific and legal work. It was principally founded on Roman-Dutch law, and is still quoted in the Dutch Courts as the text-book of the law of Holland as it was in the early part of the nineteenth century. Unfortunately it suffered from the same fault as the earlier attempts at codification of a purely Dutch character, viz., its style was too didactic. It was coldly received by the Legislature, especially by the representatives of the Southern Provinces, and finally returned to the committee for revision, the committee being at the same time enlarged.

Again, like some fourteen years before, the influence of the Code Napoléon manifested itself, and the revised draft, which, together with three other Codes, was laid before the States General and passed by the Legislature between the years 1826 and 1829, bore distinct traces of having been remodelled after the French example. The war of 1830, and the subsequent separation of the Southern Provinces (henceforward called Belgium) from the Northern (the Netherlands), prevented these Codes from becoming law. New committees were appointed, and new drafts prepared, until at last, on October 1st, 1838, the Codes of the Netherlands came into force.

During this period two systems of law had been recognised in the Courts of law, viz., the former laws and customs of the provinces until, say, 1810, and the French laws from 1810 to 1838. Undoubtedly the latter period has greatly

influenced the Dutch Codes; yet the French law never supplanted the Dutch. The most serious attempt, during that period, to restore the former law—not in its diversity of local customs, but as a system in codified form—was the above-mentioned "Ontwerp 1820."

A second attempt to re-establish the principles of Roman-Dutch law was made after the separation between the Netherlands and Belgium in 1830, when new committees were appointed to revise the Codes of that year. As these revised Codes became the law of the Netherlands, and remained so, to a great extent, for the further part of the century, it will be of interest to consider what points show deviation from the French Code and a reversion to Roman-Dutch law principles.

The Law of Persons.—In order not to trespass too much on the space for this article we will take our examples from the Common Law of the United Provinces, as far as it was embodied in the Civil Code, and from the Commercial Code. The Civil Code is divided into four books. The first book, on "Persons," begins with the rules for registration of births, marriages, and deaths, a subject until its introduction by Napoleon entirely unknown to any European State, France inclusive. Next comes marriage, and here we instantly find two important principles of Roman-Dutch law restored in which the French Code had adopted different views, viz.:—

(1) Promise of marriage is not a binding promise; neither was this in the Civil Law.

(2) Community of property by law exists between husband and wife, if not specially excluded by ante-nuptial settlement. This principle was in force in most of the former provinces.

With regard to dissolution of marriage, we find two other leading principles of Roman-Dutch law restored, viz.:—

(1) The separation *mensæ et thori* and the possibility of obtaining divorce after such separation during five years.

(2) Malicious desertion to be a ground for divorce.

As to family life, the "family councils" of the French Code were abolished and "adoption" was not taken over. Neither of them was known in Roman-Dutch law. Minority in the Low Countries ceased at the attainment of the age of twenty-five years. The Code Napoléon made twenty-one years the time for coming of age. The Dutch Code adopted twenty-three years as a compromise between the two systems, and this remained the law of the country. The new Bill fixing the age at twenty-one, in accordance with the systems of the countries surrounding the Netherlands, has not yet come into force. Majority was further obtained in Roman-Dutch law through *venia ætatis* and through marriage. Both principles found their way into the Dutch Code, though unknown to the French.

As to minors and their guardians, the Dutch reverted to the Roman-Dutch *tutela testamentaria* and *tutela dativa*. The guardianship to be exercised by the members of the family as a right was a French system, foreign to Dutch ideas, and moreover had not shown itself very commendable in practice. It was not taken over. The *curatela* of the Roman-Dutch law was of the same character as in the Civil Law, and a curator was appointed for lunatics, imbeciles, feeble-minded, deaf and dumb—in short, all those whom Grotius (Intr. i. ii.) styles "*bejaarde Weesen*" (major orphans). The French Code only knew *curatela* for lunatics, but created the *conseils judiciaires* for spendthrifts. The Dutch Code adopted the former principles with some modification, viz., it made *curatela* obligatory for all kinds of lunatics and for spendthrifts, while it allowed feeble-minded persons to apply for a curator themselves.

The Law of Things.—The second book, on "Things," contains the Dutch rules on real and personal property, and no other part of the Dutch Code shows so great a difference between French and Dutch law as this. Possession in French law was only known as a means for obtaining ownership, and was as such only treated in the Code together with "prescription." The Dutch Code contains the rules for *possessio* of the Civil Law as a separate institution. A similar reversion was made to the Roman law of *traditio*. According to French law, *traditio* of immovables was not necessary in order to transfer the ownership. Ownership passed—*e.g.*, by a mere contract of sale. According to Dutch law no such transfer takes place if not through registration, and a contract of sale gives only a personal right to sue.

Next follow the *jura in re*, viz., superficies, emphyteusis, rent-charges and tithes, all of which were unknown in French law, and not mentioned in the Code Napoléon. Even the rules as to "estates for life," which are almost entirely taken over from the French Code, had been derived by the latter from the Roman law of *ususfructus* and coincide in a remarkable manner with the rules of the English Common Law, thereby showing even more their common origin.

With regard to inheritance, the Roman-Dutch law gave seisin to all successors of the deceased whether *ab intestato* or *testamentarii*. The French made a distinction and only knew the seisin of the *heredes legitimi*—*e.g.*, children. The Dutch adopted the former system. So with regard to donations, the French extended the hotchpot clause to all *héritiers*; the Dutch—in accordance with the views of Roman-Dutch law—made a distinction between such successors who were lineal descendants and such who were not. In the former case the hotchpot clause always applies in case there is no will, and in case of a will, if not expressly excluded by the testator; in the latter it only applies in case there is a will and it is distinctly expressed by the testator.

With regard to mortgages (*hypothec*), the old rule was re-enacted that they should rank before all other debts. The "legal" mortgages and mortgages "by judgment"—which were institutions known to the French Code—were abolished, and it was enacted, as it had been law before, that no mortgage would have a legal existence if not properly registered. With regard to the redemption of mortgages, according to Roman-Dutch law the buyer of mortgaged property could insist, in case it was sold by public auction, that the purchase money which he paid was divided among the mortgagors in order to clear the property of all burdens. The French Code adopted the rule that this should also be allowed in case of any voluntary and private sale. The difficulties created by the French system are obvious. In the Dutch Code the principles of the Roman-Dutch law were re-enacted, but, as a matter of compromise, modified in certain respects according to the views of the French legislator.

The Law of Obligations.—The third book, on "Obligations," treats of obligations from different sources, viz., obligations created by contract and obligations created by law—*e.g.*, torts. This division coincides more or less with the division of the Civil Law. The French Code treats all obligations as having their origin in contracts, thereby wrongly assimilating the two.

Space forbids us to enter into details as to the different contracts. Be it only mentioned that, according to Dutch law, all contracts (with a few exceptions) entered into by minors are void; according to the French Code they were only void if they were to their disadvantage.

The Law of Evidence.—The fourth book contains the "Law of Evidence." While the French Code only treated of evidence with regard to the proof of obligations and of payments, the Dutch Code takes a general view, and codifies

the law in general, in accordance with the rules which formerly reigned in the provinces of the Low Countries.

This cursory glance will suffice to show that at every step attempts were made to bring the former Common Law of the Dutch provinces to the foreground. As a matter of fact it may be stated that still at the present time the students at the Dutch universities do not approach any subject of the *Droit civil* of the Netherlands without first having received a historical sketch of the development of the particular subject under consideration and its different treatment under the two systems of law, Roman-Dutch and French.

The Commercial Code.—Still greater difference is shown in the various subjects treated in the Commercial Code. The Dutch are pre-eminently a trading nation. They once took the lead in the commercial world; and it could hardly be expected that a slowly evolved and matured system, which had been admired and imitated by other nations, and which had become part and parcel of the people's life, would concede its place to innovations forced upon them by a nation which was a pupil rather than a teacher of Dutch mercantile practice.

It is more difficult to select than to quote examples of the extent to which Dutch custom prevails in the Commercial Code. In Roman-Dutch law, merchants' books have always been admitted as evidence of the facts they contained, though not as conclusive evidence. In order to enable a party to produce them it was necessary to state on oath that they had been correctly kept; and if the person who kept them had since died, even this was not necessary. (Cf. Voet. Comm. ad tit. Pand: "de fide instrumentorum," xxii. 4, s. 12.) The French Code provided that such books could only be produced in evidence if the judge thought fit. The Dutch Code in its tenth article adopts the principle already stated.

The Commercial Courts, known in the French administration but not in Holland, were not taken over.

Next came the provisions regarding deposit bankers (*Kassiers*) and brokers. *Kassiers* were not known in France. They are of Italian origin; but were acclimatised at an early date in Holland, and became very popular there. They receive money on deposit, which they must hold at the call of their customers. They are not allowed to trade with the sums entrusted to them. In so far they are not bankers; but they are accustomed to lend the money on marketable securities. The first Dutch institution of the kind, the Amsterdam Bank, at first was merely *Kassier*—caretaker of cash, like the old London goldsmiths.

Brokers date very far back in Holland. Originally they were a municipal institution, and received their nomination from the Municipal Council. The French Code de Commerce gave them a monopoly (Art. 76), and left their nomination to the Emperor (King in Holland). Both these things were abolished in the Dutch Commercial Code, and the old Dutch municipal custom was again reverted to. The brokers have to take an oath on their entering upon their duties. The codified law on this subject is very old law indeed.

The same may be said with regard to the commercial paper in use. The rules regarding the orders for payment of sums of money given by the customers to their *Kassiers*, and commonly known as "*kassiersbriefjes*," has been laid down in regulations and orders of the different towns in Holland. Thus we possess the "Amsterdamsche Keur" (Order) of January 30th, 1776, which may be considered as the principal source of the provisions laid down in the Dutch Commercial Code on this subject. *Kassiersbriefjes* are simply receipts, and may be compared with open bearer cheques. Generally speaking, the Code de Commerce did not contain any provisions regarding paper made payable to bearer,

though this subject was treated in several orders (*Keuren*) of Dutch towns and many treatises on Roman-Dutch law.

Again, the rules regarding *Assignaties* are mainly taken from the Theses of Van der Keessel, 831–851, on "*Assignationes*," though not all of them have been taken over. As an instance, Thesis 850 may be compared with the words of Art. 219 of the Commercial Code. An *Assignatie* is not a bill of exchange, and should rather be compared with a cheque. In most countries rules regarding same are left to the customs of merchants. It would be in vain to look for any provisions on this subject in the French Code.

Another instrument which has been treated according to specific Dutch custom is the bill of lading. The Code de Commerce only contains five clauses on "*Connossements*." Nearly all the provisions in the Dutch Code are in accordance with what had always been observed as law in the Seven Provinces. The rules regarding these bills were *e.g.* laid down in a document called "*turbe*," and written by twelve Amsterdam lawyers; it was dated March 12th, 1661, and set forth what had been custom or common law during the time its compilers practised. Cf. Barels, *Advyzen over den Koophandel en Zeevaart* ("Opinions on Commerce and Navigation"), 1780.

Reclame—i.e. the right to reclaim goods sold, but not yet paid, from the debtor—is founded on the Roman law principle that the ownership does not pass before the price is paid or the seller has been satisfied in some other way. Inst. Lib. ii. Tit i. de Rerum Divisione, s. 41. Dig. xviii., l. 19, 53. "Venditæ vero res et traditæ non aliter emptori acquiruntur, quam si is Venditori pretium solverit vel alio modo ei satisfecerit." This principle is mentioned by Grotius in his Intr. ii. 5, 14, and by Van der Keessel, Thesis 203.

The Code Napoléon (Art. 2102, 4°) and the Dutch Civil Code (Art. 1191) both based hereon the provision that any seller of movables, if no credit is given, has a privileged claim on those goods during thirty days after delivery for the unpaid purchase price. The Code de Commerce adopted the same principle for merchants, but in case of bankruptcy only.

When the Dutch threw off the French legal yoke, the admirers of the French Codes disputed with the friends of the old Dutch law whether the Civil Law principle should be reverted to or not. After a hard struggle the latter carried the day. Arts. 230 to 245 of the Commercial Code provided that merchants shall have the above mentioned rights under all circumstances, and not in case of bankruptcy only.

The conditions attached to this right—viz., that no credit be given, that the price remain unpaid, that the articles sold be in the same condition and still in the hands of the debtor, and that *reclamation* take place within thirty days after delivery—were modified with regard to merchants in so far that the principle would apply where the goods had been pawned, sold, or were partly gone, while even, in case they had been sold, the price can be reclaimed.

Insurance.—Here we have one of the clearest proofs that Roman-Dutch law has not been discarded by those who codified the rules handed down to them by their ancestors. Though the development of insurance only took place during the second half of the nineteenth century, and no elaborate system of the law of insurance could be expected at an earlier date, the particular branch of marine insurance should be excepted. The rules regarding this branch carry us far back in legal history, which need not surprise us when we know that in the middle of the fifteenth century marine insurance was regularly transacted in Bruges.

The first attempt to codify the regulations governing insurance in the various Dutch provinces was the Ordinance of Charles V. in 1549, followed by the Ordinance

of Philip II. in 1563 and a *mandament* of the same Prince, issued by Alva in 1570, and mainly embodying the Amsterdam customs. The first Ordinance of Amsterdam on this matter in 1598 again agrees in its principal parts with this *mandament*. During the eighteenth century the principal towns had each their Ordinances, called "*Keuren*." The principal ones are those of Amsterdam of March 10th, 1744, April 27th, 1745, January 30th, 1756, and January 31st, 1775; of Rotterdam, of March 12th, 1604, which was sanctioned by Government in 1635 and replaced by a new *Keur* on January 28th, 1721; of Middelburg, dated September 30th, 1600; Vlissingen. dated Febuary 12th, 1661, and the Dordrecht Institutions for the Sheriffs of Admiralty and Ordinance of Insurance, etc., dated January 30th and July 13th, 1775.

These town *Keuren* greatly influenced the provisions of the 1809 Code, and through these the Commercial Code of 1838. Thus the Dutch Code greatly surpasses the French Code de Commerce on this point. The French Code derived its provisions from the famous Ordinance of Louis XIV. but thereby contains a law of insurance which is less developed than the *Keuren* of the Dutch towns.

A few illustrations will further show the principles of Roman-Dutch law still in force.

When different underwriters have consecutively insured the same risk, and the first insurance already covers the whole risk, all subsequent insurances are invalid. This principle was embodied in the Ordinance of Philip II. of 1563, Arts. 7 and 15. (Cf. Van der Keessel, Thesis 763.) If the same risk is covered by several underwriters, such risk is borne by them proportionately, according to the sums subscribed. Also an insurance contract once entered into cannot be dissolved (Van der Keessel, Thesis 964).

The Dutch Code does not prescribe a rigid form of policy, but insists that certain stipulations shall be enumerated in the policy, and that proof of the contract must be in writing. This may be taken as a reminiscence of the rule *hic contractus moribus et legibus certam formam et vim obligandi acceperit* (Van der Keessel, Thesis 713).

The provisions of Art. 282 of the Commercial Code—viz., "If the contract becomes invalid on account of cunning, fraud, or roguery on the part of the insured, the insurer shall keep the premium"—will be easily recognised in the words used by Grotius in his *Institutions*, iii. 24, 20.

The exceptions to the general rule that the valuation by experts at the time the contract was entered into shall be binding for the two parties—viz., that revaluation may take place

(1) If the ship was insured for its purchase price or the cost of building same and its value had already diminished by age or a number of voyages;

(2) If the ship is insured for several voyages and is shipwrecked after having made one or more of them and has earned freight on account thereof—

are bodily taken from the Amsterdam Ordinance of March 10th, 1744, Clause 33.

Clause 35 of the same Ordinance, providing that in exception to the rule "that the exact value of the goods insured may be increased with the amount of freight, custom duties, and other expenses" such increase shall not take place if the insured goods do not reach their destination, is embodied in the first paragraph of Art. 614 of the Commercial Code.

A curious instance is given by the insurance of future (unearned) profit. Such insurance was strictly prohibited by Placards of Charles V. and Philips II., and also by Ordinances of Rotterdam and the French Code de Commerce. The Amsterdam Ordinances admitted the legality of such insurance, and the same was inserted in the draft Code of 1809. From that Code it was taken over by

the Commercial Code of 1838, and thus became the still existing law of the Netherlands.

Abandonment.—The rules regarding the right to abandon the insured vessel to the insurers against payment of the insurance money can be traced through the Ordinance of Burgos (1538), Guidon de la Mer, Amsterdam Ordinances of 1598 (Arts. 8, 9, and 25), January 25th, 1640, January 24th, 1701, March 10th, 1744 (Arts. 26, 28), Rotterdam Ordinances of 1604 (Arts. 12, 14, and 15) and of 1721 (Arts. 60, 69) to Arts. 663–680 of the Dutch Commercial Code.

Bankruptcy.—So much as regards insurance. A few words may be added on one other subject, viz., bankruptcy rules and *Surseance van betaling*—*i.e.*, temporary stoppage of payment with the sanction of the authorities.

Holland knew three modes in which a merchant could suspend payments without being declared a bankrupt, *viz.*—

(1) The *Atterminatie*, or letters of respite, which are equivalent to the *rescriptum moratorium* or *inducia* of the Civil Law.

(2) The *mandamenten van inductie*, being a mandamus for settlement or composition with the creditors without bankruptcy.

(3) *Surseance* of payments, which Van der Keessel, in his Thesis 895, calls "*beneficium æquitatis et juris rationi haud parum contrarium.*" *Surseance* may be compared with a *moratorium*, but then for a single person. It is an act of grace by the sovereign and is based on his princely power.

These three modes of temporary suspension of payments were altogether abolished by the French, but immediately restored by William I. on his ascending the royal throne of the Netherlands in 1814. They were all considered beneficial, and granted by the Prince, after having heard the opinion of the High Court of Justice. All three were maintained in the "Ontwerp 1820."

In the Commercial Code of 1838 the first two disappeared, but *Surseance* remained, though modified—*viz.*, only to be granted to merchants. This modification was in accordance with the bankruptcy rules, all of which only applied to merchants. At the same time it ceased to be an act of grace; it was no longer the Prince, but the Supreme Court of Appeal (Cour de Cassation), which would grant it.

Thus matters remained until the Bankruptcy Act, 1893, which came into force on September 1st, 1896. This Act provides that the bankruptcy rules shall apply to all persons, whether merchants or not. Therewith the restrictions that *Surseance* should only apply to merchants disappeared; it may be granted to all persons who are in financial difficulties of a temporary character. At the same time it has been provided that it shall no longer be granted by the Supreme Court of Appeal, but that application shall be made to the High Court, and that the judge in first instance shall decide whether the circumstances are such that the applicant is entitled to temporary stoppage of payments without being declared a bankrupt.

Surseance is no longer an act of grace; it has developed into a right to which all citizens are entitled, if the particular circumstances warrant it. The institution is of pure Dutch character, and its development continued long after—as it has been alleged—"codification killed Roman-Dutch law and French law superseded the institutions of the Low Countries." It will hardly be necessary to quote any further examples in order to show the fallacy of such general condemnation.

[Hitherto the Society has only been able to present an annual review of the legislation of the British Empire; but the editors of the Journal have always recognised that more than this is necessary: that the Society ought to supply annually a critical summary of the legislation of the principal European countries, and also of the legislation—State as well as Federal—of the United States of America; that the Society ought not to rest satisfied, indeed, until it presents every year a complete summary, fully indexed, of the legislation of the civilised world. The following reviews of the legislation of France and Germany for 1900, kindly contributed by Mr. George Barclay and Mr. Ernest Schuster, are a first instalment of this scheme. Next year the editors hope to carry it out still further.—Ed.]

FRENCH LEGISLATION IN 1900.

[*Contributed by* George R. Barclay, Esq.]

The year 1900 has not been productive of much new legislation. The Government was occupied chiefly with the Exhibition, and there was a sort of tacit understanding that party questions should be avoided.

The Legal Rate of Interest.—The only measure of general importance was the law of April 7th, 1900, reducing the legal rate of interest from 6 per cent. to 5 per cent. in commercial matters, and from 5 per cent. to 4 per cent. in non-commercial matters. It is not generally known that the law fixes a maximum rate of interest chargeable even by contract. By a law of 1807 this maximum was fixed at the rate of 6 per cent. and 5 per cent. for commercial and non-commercial matters respectively. These rates continued until 1886, when the rate of interest in commercial matters was made free to be fixed as suited the contracting parties. In non-commercial matters, however, the rate of 5 per cent. continued to be a limit beyond which the contracting parties could not go. The new law makes no change in this, but simply provides that when the parties have not contracted to the contrary, the rate shall be reduced from 6 per cent. and 5 per cent. to 5 per cent. and 4 per cent. Thus the maximum rate allowed by law to be stipulated on mortgages, which are non-commercial matters, is 5 per cent., but where no interest is agreed upon, it

would be 4 per cent.; in commercial matters, the parties can fix the interest they choose, and if none is stipulated, the rate is 5 per cent.

Husband and Wife—Disposal of Life Rent.—Another fundamental change, but of minor importance, was a modification of Art. 1094 of the Civil Code, which provided that the husband or wife could dispose by will of the whole of the life-rent of his or her property in favour of each other, where there is no issue of the marriage, and although there may be parents surviving. This provision is now altered in the interest of the parents, on the ground that the legitim in their favour stripped of the life-rent which the law gave to the widower or widow (who would probably survive them) was contrary to common sense. This measure will operate, in most cases, as a diminution of the widow's rights.

Lady Barristers.—The admission of women to plead at the Bar, on the other hand, was one of the greatest steps in favour of the emancipation of women taken on this side of the Atlantic; the Act recording it is dated December 1st, 1900. It came a few days before the opening of the century to mark a new era. Two ladies have already been admitted—namely, Mme. Petit and Mlle. Chauvin—and the novel sensation of seeing these ladies, who have already several times pleaded in court, is already passing away.

The Amnesty Act.—The only other important law adopted in 1900 was the Amnesty Act, which terminated the notorious Dreyfus affair.

GERMAN LEGISLATION IN 1900.

[*Contributed by* Ernest J. Schuster, Esq., LL.D. (Munich).]

I.—Introductory Observations.

It has been suggested that this journal should in the future contain annual reviews of the legislation of the principal Continental States, and in connection with this proposal the editors have requested me to contribute a specimen article on last year's legislation in Germany. The following pages are the result of this request, but owing to the small space of time which was available for the purpose they fall short, in several important respects, of the minimum degree of completeness which ought to characterise a summary of foreign legislation, and more especially the first one of the series relating to any particular country. The following are some of the matters which I have been unable to deal with, and which I hope to refer to in the next annual summary.

The review of the legislation of any foreign country ought in the first instance to be preceded by a short statement as to the methods of legislation used in such country, with special reference to the part played by "subordinate legislation"—using the word in the sense given to it by Sir Courtenay Ilbert in his *Legislative Methods and Forms*—and in the case of a federal State like Germany it is also necessary to point out the relation in which federal legislation stands to State legislation.

The annual summary should moreover consist of two parts, of which one should give a complete list of all the enactments passed in the year, whilst the other should contain a concise report on the more important Statutes, and their effect on the previously existing law. In the case of Consolidation Acts the whole of the law affected on the subject thereby should be given in outline. The summaries of the more important Statutes should not omit the financial Statutes, which often contain matters of importance and interest.

It was impossible for me to deal with these matters in an adequate manner: the two first-mentioned topics would have necessitated more expenditure of time than was at my command; a complete list of the Statutes passed would have been useless without some preliminary explanation, and

the same may be said as regards the summaries of financial legislation to which I have referred, as these would also have necessitated some elucidation which will be easier in connection with the comments on the other general subjects, by which I hope to be able to introduce the annual review of the legislation of the present year. I also hope on that occasion to include the legislation of the more important States, which had to be omitted from the present summary, which deals with Imperial legislation only.

One of the characteristics of German modes of legislation must be mentioned here, as it affects several of the Statutes referred to below. It is frequently the case that an Act amending a previous Act, or a series of previous Acts, relating to the same subject contains a clause enabling the Imperial Chancellor to publish the text of the principal Act as altered by the amending Acts. The revised text is subsequently published in the official Collection of Statutes, and all subsequent references are made to relate to this revised text, which in effect becomes a Consolidation Act promulgated by virtue of the authority of the Legislature, without, however, being directly sanctioned by the legislative authorities.

The foregoing observations sufficiently show the incompleteness of the present summary, but it is hoped that even the imperfect sketch contained in the following pages will prove how valuable the material would be which not only lawyers, but also economists and students of social and political problems, would be able to obtain from this journal, if the plan to bring continuous reviews of the legislation of European countries were to be carried out. It will be found that one year's legislation in one foreign country only contains two most important Consolidation Acts, comprising respectively the whole of the law as to trade regulation and as to compulsory insurance, that two other Statutes deal with the prevention of disease, whilst another enactment relates to the suppression of certain forms of crime which in this country also have in recent years been the subject of special legislation. Two of the year's Statutes deal with the administration of law in uncivilised countries; and the remaining two, dealing respectively with the punishments to be imposed in respect of the unlawful abstraction of electricity and the qualifications and registration of patent agents, are an illustration of the demands on the legislator's activities by the progress of applied science. The creation of a new recognised profession requiring scientific as well as legal special training is an important and interesting fact.

II.—Summary of Legislation.

(1) **Theft of Electricity.**—The abstraction of electric power, which in this country has been declared equivalent to simple larceny by the Electric Lighting Act, 1882, s. 23, has been the source of much discussion among German criminal lawyers, who have found it difficult to discover a proper place for it in the ordinary classifications of crime. The above-mentioned

Statute provides that any person guilty of such misappropriation is to be subject to one of the following punishments :—

(*a*) If the person diverting the electric current unlawfully intends to use it for his own advantage, the maximum punishment is five years' imprisonment and a fine not exceeding 1,500 marks ;

(*b*) If he unlawfully intends to cause damage to another person, the maximum punishment is 1,000 marks ;

The attempt to commit either offence is punishable in a corresponding manner.

(2) **Registration and Qualification of Patent Agents.**—The profession of patent agent up to the passing of the above-mentioned Statute was not subject to any official control. The new law provides for—

(*a*) Compulsory registration ;

(*b*) Qualification as to German domicil, age, solvency, and moral reputation ;

(*c*) Technical qualification, including the requirement of university or advanced technical school education and three years' practical training ;

(*d*) Qualification as to legal knowledge ;

(*e*) Removal from the register in case of bankruptcy or any other disqualifying event or circumstance ;

(*f*) The establishment of a disciplinary tribunal consisting of two members of the Imperial Patent Office and three patent agents.

(3) **Statute Relating to Certain Offences Against Public Morality.**—This Statute, which is generally called "lex Heinze" (being, like the Senatus-consultum Macedonianum, described, not by the name of its author, but by the name of the malefactor whose misdeeds inspired the legislator's activity), was the subject of prolonged discussion, and some clauses which had been inserted into the original Bill, but were subsequently dropped, produced an agitation among the more highly educated classes in Germany of almost unparallelled extent and intensity, as if passed they would have led to unwarranted interferences with literary and artistic freedom. The clauses which now remain deal with the same matters as the English Criminal Law Amendment Act, 1885, the Indecent Advertisement Act, 1889, and the Vagrancy Act, 1898, but some of the punishments are much more stringent in the German law ; thus, under the new German Statute, a male person who wholly or in part lives on the earnings of prostitution obtained by any female person is punishable with imprisonment for a minimum term of one month and a maximum term of five years, and if he is the husband of the prostitute, or by force or threats compels her to resort to prostitution, the *minimum* sentence is one year.

One of the innovations retained from the eliminated clauses is the notice which is taken of a certain class of "writings, pictures, or representations which, without being indecent in a sexual sense, grossly violate the sense of

shame." The sale or exhibition of such writings, etc., which in the original Bill was threatened with punishment in all cases, is now punishable only in the case of young persons being the actual or intended purchasers or borrowers, the maximum punishment in such a case being six months' imprisonment.

Another clause of the same Statute imposes a maximum punishment of six months' imprisonment on any person who publishes scandalous details relating to judicial proceedings from which the public was excluded on the ground that their publicity would endanger public morality.

(4) **Statute for the Prevention of Dangerous Epidemics.**—This Statute deals with leprosy, Asiatic cholera, typhus, yellow fever, bubonic plague, and smallpox. The duty to notify any case suspected of showing symptoms of any one of these illnesses to the competent police authorities is imposed on the following persons in the order in which they are here enumerated :—

(*a*) On the medical practitioner attending the case,
(*b*) On the head of the household,
(*c*) On all persons engaged in nursing the patient,
(*d*) On the owner of the tenement, and
(*e*) In the case of any death, on the person performing the duties of a coroner.

If any person or class of persons enumerated before the others exists, the person or classes of persons mentioned subsequently are released from the duty. Immediately on the notification having been made, the medical officer of the district has to investigate the matter, and if the suspicion is confirmed, the sanitary authorities, and in case of urgency the medical officer himself, have to order the precautionary measures prescribed by the new law. These include isolation of persons and localities, observation of persons likely to have been infected, regulations as to the sale or export or carriage of goods likely to spread infection, disinfection of buildings, and disinfection or destruction of objects likely to be impregnated with the germs of the disease, etc.

If an epidemic of the nature described has broken out in a foreign country or on any part of the German coast, the Imperial Chancellor—or the State Government with the concurrence of the Imperial Chancellor—may issue regulations as to the admission of ships and the importation and carriage of goods or passengers coming from the infected country or district.

The Statute provides for the compensation payable to persons suffering from any of the precautionary measures, but leaves the details as to the mode of enforcement and payment to State legislation.

A new central sanitary authority is created under the name of the Imperial Sanitary Council, which is intended to assist the previously existing Imperial Sanitary Office, an authority entrusted with scientific investigations, but not exercising any administrative functions. Persons acting in disregard of the precautionary orders as to the use or carriage of articles ordered to be disinfected are liable to imprisonment for a maximum term of three years.

The Statute is not to interfere with any provisions of State law in so far as the duty of notification imposed thereby goes further than the duty prescribed by the Imperial Statute. The Federal Council is authorised to add any other infectious disease to the list of diseases to which the Statute applies.

(5) **Statute Relating to the Examination of Animals and Meat.**—This Statute, like the "lex Heinze" mentioned above, is a good example of an apparently non-controversial measure being used for purposes of political agitation. In this instance the desire of the Government to prevent the spread of diseases by the consumption of the meat of diseased animals was used by the Agrarians for the purpose of agitating in favour of provisions intended to protect them against the competition of certain classes of foreign meat producers, and their endeavours, notwithstanding the great opposition which they roused, were at least partly successful. The importation of canned meat and sausage is now prohibited altogether, and as to other kinds of fresh and preserved meat, very stringent regulations have been made, which, however, are intended to be of a temporary nature only. The other parts of the Statute are instructive as they show what unexpected classes of animals are used for human food. The general provisions extend to oxen, cows, calves, pigs, sheep, *goats*, *horses*, and *dogs*, and there are some special provisions as regards the examination and sale of horse-flesh, which the Federal Council is empowered to extend to "*asses*, *mules*, and *dogs*."

The animals to which the general provisions are applicable have to be examined officially, as well before as after being slaughtered, which rule is subject to an exception in favour of persons not being butchers or innkeepers slaughtering animals for their own household purposes. If the examination of the living animal prove satisfactory, it may be killed, but subject to such precautions (if any) which the official examiner may direct, and if the subsequent examination of the meat of the slaughtered animal prove equally satisfactory, the examiner has to certify as to its fitness for human food. If the result in the last case is unsatisfactory, the sale of the meat may either be forbidden altogether or may be allowed for purposes other than its use as human food, subject to such precautionary measures as the police authorities may order. If the meat is declared fit for human food, subject to certain restrictions, its sale may be allowed, but in such a case it must be designated by some name showing the qualified nature of the permission, and in the case of meat-dealers and innkeepers may be forbidden altogether.

Any person transgressing any of the rules as to the submission of animals or meat for examination or as to the mode of selling meat is liable to be fined or imprisoned for a short term.

(6) **Statute amending the German Trade Regulation Act.**—The Imperial Trade Regulation Act (*Gewerbeordnung*) comprises matters which in this country are contained in the Factory Acts, Public Health Acts, Licensing

Acts, Pawnbrokers Acts, Pedlars Acts, and a number of other Statutes dealing with special matters. It is, in fact, in the nature of a Code on the subject of the regulation of all trades and employments (including some of the learned professions) in so far as the public law deals with them. The original Statute relating to these matters was passed in 1869, and, together with numerous amending Acts, embodied in a Consolidation Act in 1883, it being then hoped that the amending Acts had come to an end. That hope, however, proved futile, and six further amending Acts, including the one mentioned above, have from time to time become law.

The amendments contained in the Statute passed in 1900 cannot be reported on without reference to the general law on the subject. They have been embodied in the Consolidation Act referred to above, of which we hope to give a summary in our next review of German legislation.

(7) **Statutes amending the Compulsory Insurance Acts.**—Compulsory insurance in Germany comprises (1) insurance against illness, (2) insurance against accidents, (3) insurance against old age and permanent disablement. Some small amendments have been introduced by a Statute passed in 1900 with reference to insurance against illness. The law as to insurance against accidents was amended and consolidated in 1900, and is now embodied in five Statutes dealing respectively with—

(*a*) General matters ;

(*b*) Insurance of persons engaged in trades not specifically dealt with ;

(*c*) Insurance of persons engaged in agricultural employment and forestry ;

(*d*) Insurance of persons engaged in building trades ;

(*e*) Insurance of persons engaged in maritime employments.

The law as to insurance against old age and permanent disablement was consolidated in 1899. It is proposed in the next review of German legislation to give a concise summary of the whole effect of the legislation on compulsory insurance in its present form.

(8) **Statute concerning Consular Jurisdiction.**—This Statute was made necessary by the great changes as well in the substantive law as in the law of procedure which were brought about in Germany by the coming into force of the new Civil Code, and the several Statutes passed in connection with the same. It replaces the Statute of 1879 on the same subject. German consular jurisdiction is exercised in all countries in which its exercise is permitted either by usage or by international agreement. The persons subject to jurisdiction are—

(*a*) German subjects not being members of an embassy or otherwise enjoying the privilege of exterritoriality according to the general rules of International Law ;

(*b*) Subjects of other States in so far as they have been placed under German protection.

Mercantile partnerships and incorporated companies are subject to consular jurisdiction if their principal place of business is situate within

the German Empire or any German Protectorate, and mercantile partnerships also in the case of all partners being German subjects. The consular jurisdiction is exercised by—

(*a*) The consul,

(*b*) The Consular Court (consisting of the consul and two assessors, with the addition of two further assessors in certain criminal matters, such assessors being laymen chosen by the consul for each year from the inhabitants of the district), and

(*c*) The Supreme Imperial Court at Leipzig.

Civil matters are tried and decided according to German Imperial law, and in cases in which such law may be qualified or supplemented by State law, by Prussian law. Criminal matters are tried and decided according to Imperial law, but as to certain matters special rules may be made by Order in Council establishing deviations from the general law, and certain other matters are specially regulated by the above-mentioned Statute. In the case of disputes on questions depending on Mercantile Law, the customary Mercantile Law of the district prevails over Imperial law.

(9) **Statute amending the Act relating to the Law of the German Protectorates.**—The principal Act on this subject, which was passed in 1888, is now amended with reference to the changes in the law relating to consular jurisdiction, and the whole law as it now stands is shown by an amended edition of the principal Act published by the Imperial Chancellor in the manner referred to above. Jurisdiction in the German Protectorates is exercised in a manner corresponding to the exercise of consular jurisdiction, an official specially appointed in that behalf taking the place of the consul in each Protectorate. Some special clauses give authority to the Federal Council to grant corporate rights to companies having their principal place of business within any Protectorate or any district in which consular jurisdiction is exercised, subject to certain requirements as to the memorandum of association of such companies.

NOTES.

Egypt and the Administration of Justice.—Sir Raymond West writes to us as follows on the latest report by the Judicial Adviser to the Khedive: "Egypt, as it has long done, still presents the spectacle common under the French system of organisation of Courts generally—and the appellate Courts, especially—overmanned. The Courts of first instance are at the same time too few and too ill-paid. From the report of the Legal Adviser to the Egyptian Government for 1900 it appears that in 1893 the summary Courts, then thirty-six in number, disposed of twenty-four thousand cases. In 1900 the judges of these Courts, without increase in their number, were distributed among forty-five summary Courts, which disposed of eighty thousand cases. It was to be expected that the number of appeals in such circumstances should greatly increase, as in fact it has, though not in proportion to the number of decisions, but the pressure of work has manifestly been too great when it has caused 'serious apprehensions as to the quality of the judgments rendered.' Speedy justice is eminently desirable; speedy injustice is not much to be preferred to tardy injustice. It induces more disputes than it settles, and produces exasperation that leads to crime.

—— **The Court of Appeal Overmanned.**—"This report of the Legal Adviser notes with some regret that two tribunals of first instance were established in 1900 by suppressing one judgeship of the Court of Appeal which fell vacant and assigning the salary in moieties to two inferior judges. Still the staff of the Court of Appeal consists of twenty-two members, having been increased in 1896. If this be compared with the manning of the appellate Courts in England or in India, the disparty is glaring. In Bengal a High Court of fifteen judges disposes, besides the chief original suits of the great city of Calcutta, of the appellate work, civil and criminal, of a population of seventy millions. Were the judiciary of Egypt reorganised, a chief Appeal Court of seven judges ought to suffice. So reduced in numbers the appellate judges could be paid respectable salaries, and seven men of eminent ability, added to a knowledge of Arabic, could be found, while twenty-two cannot. There would still be a saving of money out of which more of the primary and most useful tribunals could be established. The agglomeration on a Bench of mediocrities or nonentities who are not called on to give individual judgments is a part of the French system with which Egypt could most easily dispense. Long experience in India has shown

that amongst Orientals a one-man Court is the best for the trial of original suits, and that even in appeal a numerous Bench is of no use except when, occasionally, some great question of principle has to be decided.

—— **The Cost of Administering Justice.**—"The cost of the administration of civil justice in Egypt is a question that deserves examination according to more definite principles than the Legal Adviser has applied to it. The administration of justice is represented as earning for the Government £321,000 a year. But this includes the registration fees on transfers, etc., of real property, levied at an oppressive rate, and for a service which is in no way an administration of justice. The registration offices ought to be wholly separated from the Courts; they could then be better organised, better superintended, and made more useful by a wider diffusion. The contiguity, too, in the same building of the registration office and that of the Court affords opportunities for fraud through forgery, which are avoided by keeping them wholly apart and unconnected.

"But while credit is wrongly taken for registration fees as judicial revenue, the Civil Courts are not allowed credit for the time and labour expended by them on criminal cases. This must be very considerable, and if 'Criminal Justice' were separately charged with it, the cost of administering civil justice would probably be found considerably less than the gains made by it even without the aid of registration fees. There is a difficulty when a Court disposes alternately of civil and criminal business in determining precisely what part of the total charges should be debited to each. When a similar difficulty arose in India a generation ago, it was met by distributing the total between 'Civil' and 'Criminal' according to the number of hours which the judge of a Court had to give to each, and as the executive accessories correspond approximately in their relative proportions to those of the judicial work a similar method might perhaps be usefully employed in Egypt.

Altering a Written Instrument—"Pigot's Case" in India.—The principle of English law laid down in *Pigot's Case* (3 Rep. 266), that the material alteration of a document by a party to it after its execution without the consent of the other party renders it void, is well recognised in India. We now have from India an interesting qualification engrafted on the rule (*Atmaram* v. *Umedram*, 3 Bombay Law Reports 213). The plaintiff in the suit there claimed to recover a sum of Rs. 2,000 with interest lent to the defendant. His claim was *prima facie* statute-barred, but he relied on an acknowledgment of the debt—a *sumadaskat*, or admission of a balance contained in a document by the defendant—to take it out of the statute. The acknowledgment was not disputed, but it had been materially altered by the plaintiff without the consent of the defendant, and the defendant's contention was that such alteration had the effect of vitiating altogether the acknowledgment under the rule in *Pigot's Case*. The Court, however, did not accept this view, holding that the rule only applied where the altered

instrument was the foundation of the plaintiff's claim and the source of the defendant's liability. Here it was not; the written acknowledgment was merely evidence of the original liability, which it sought to keep alive. The reason of the rule in *Pigot's Case* is the fraud of the party altering the instrument while in his custody. If it were extended indiscriminately to vitiate every document adduced merely as evidence in support of a claim, it would operate with undue severity and shut out true evidence because it has been altered into false. This is in accordance with the distinction drawn by the Judicial Committee of the Privy Council in *Gopee Kishen Goshamee* v. *Brindabun Chunder Sircar Chowdry* (13 Moo. I.A. 37).

A Refugee Tenant of Ladysmith and Rent.—There was a Roman citizen, we know, who purchased a farm at its full value the day after Cannæ and received the thanks of a victorious Senate for not having despaired of the Republic. The defendant in *Rahim Abdool Rahman* v *Esop Suliman* (21 Natal Law Reports, N.S., Part IV. 133) was not cast in this heroic mould. He was in the autumn of 1899 lessee of a house in Ladysmith, then threatened with investment by the Boers, and not being so confident of the issue as he of Rome—at all events, disinclined to risk the situation—he quitted the demised premises at the end of October, 1899, and did not return till he could safely do so, viz., at the beginning of March, 1900. He was ready to pay rent till the end of October and from the beginning of March, but he disclaimed liability for the intervening months on the ground that he was prevented from occupying the premises by the Queen's enemies, and he had his disclaimer allowed by the Court. "It makes little difference," said Gallwey C.J., "whether the defendant left the premises through actual danger or from apprehension of it to come. . . . It was a danger to his life to return, and a danger to his liberty. He tendered rent for the months of October, March, and April, and I think that is all he is bound to pay." This is in accordance with Roman-Dutch law as stated in Van Leeuwen (Kotze), p. 175, n. (*g*), that a lessee effectually deprived of the occupation or use of the premises can claim an abatement of rent unless he has taken all risk upon himself. It strikes us in England as novel: we are so accustomed to a lessee's covenant for quiet possession being restricted to his own acts and the acts of those claiming through him; but this is the mere practice of conveyancers. The word "demise" carries at Common Law an implied covenant for quiet possession against all the world; it is one of the first things about which the conveyancing novice has to be warned.

Breach of Promise of Marriage in France.—Not the least salutary of the uses of a study of comparative law is that it holds up a mirror to our national complacency. Our English freedom in the matter of marriage, for instance! It is one of the points on which we plume ourselves, and we are apt to bestow a corresponding pity on the foreign nations with whom affairs of the heart are "arranged," and yet in this very point of pride—

free choice in marriage—we stand indirectly censured by the law of France, one of the recipients of our pity, for by the law of France all promises of marriage are invalid. And why? Because at lovers' perjuries they say Jove laughs? No! "Comme portant atteinte à la liberté illimitée qui doit exister dans les mariages." Theirs is the true freedom apparently, not ours; at all events, down to the irrevocable "I will" there is a *locus pœnitentia* which need not be purchased by damages in a breach of promise action.

Nevertheless, French law lends no favour to inconstancy, and if actual special damage (*préjudice*) can be shown to have resulted from non-fulfilment of the promise, the amount of such damage "can be recovered": as where the engagement has been announced, say, in the Society papers and the refusal to marry is calculated to injure reputation, or where *la grossesse de la fille* has resulted or expenses been incurred; but loss of the chance of an establishment is not prejudice, though that word has a wide signification, moral as well as legal. But in any case the damages are due *ex delicto*, not *ex contractu*.

The Comparative Method in France.—"Paradox though it seems," writes Mr. A. R. Whiteway, "the comparative method has now taken just as firm a hold upon the French Professor of History as upon his Anglo-Saxon *confrère*. Though by reason of heredity and environment combined French genius is given to general explanations and *à priori* theories, she has lately won a victory from herself by overcoming this besetting sin. For has she not given strenuous literary recognition of the truth that 'Insititutions, like forms of organic life, are subject to the great law of Evolution'?

"Hence follows, as of course, abandonment, not only of manifold general theories, but also of the exegetic method of teaching, and in consequence, so as to take their place, development of the institutional treatise and elementary manual of the history of law, to which two books at least that have lately appeared bear striking testimony. Moreover, this evidence is corroborated by a cloud of witnesses too numerous to name in detail here, among which the works of M. Esmein [1] and M. Ginouilhac [2] are good examples. The two text-books more particularly referred to here are the *Histoire du Droit Civil Français* of M. Viollet and the *Manuel d'Histoire du Droit Français* of M. Brissaud, of Toulouse, the latter unfortunately not as yet wholly complete, though probably more than three-fourths of its entire contents appear in the four fascicules that have already been published, and which bring it up to about March, 1804, the date that the author takes to be the end of the revolutionary period.

"M. Brissaud, after considering the sources of French law, proceeds to

[1] *Cours Elémentaire de l'Histoire du Droit Français*, 3rd ed., 1 vol. in 8vo, 1897, 10 frs.

[2] *Cours Elémentaire de l'Histoire Genérale du Droit Français Public et Privé*, 2nd ed., 1 vol. gr. in 8vo, 1890, 10 frs.

trace its course during feudal times, namely, to the end of the sixteeenth century. With regard to this period, if he cannot be said to have clearly shown how land originally held in *dominium* came to acquire the aspect of feudalism, and from having been essentially divisible took the form of fief and became incapable of division, he yet gives us step by step the history of feudal growth, its heyday, decline and fall. In the expressive pages dealing with this portion of his subject, frequent reference is made, not only to numerous German, but also to English authorities, while details, such as the different views of Von Ihering and Savigny on literary romanticism, are not overlooked in the part entitled 'The Monarchical Period,' namely, that ending with the Revolution of 1789. Afterwards Parliamentary Government in England is contrasted with the principles of 1789, but no reference is to be found there to the growth of the power of the Cabinet, the prepotence and functions of which have with us now in practice usurped most of the ancient prerogatives of the Crown. When this work is completed and made more easy for use by the addition of an index and table of contents, its great merits will be still more apparent than they are in its present somewhat incomplete condition.

"M. Paul Viollet's *Histoire du Droit Civil Français, accompagnée de Notions de Droit Canonique et d'Indications Bibliographiques* amply justifies the expectations that would naturally be formed of it from having been awarded the Grand Prix Gobert of the Académie des Inscriptions et Belles-Lettres. Complete in itself, with both methodical and alphabetical tables of reference, it is a more convenient educational tool than is M. Brissaud's work in its present form. The author deals in his first book with the sources of Gallic, Roman, Canon, Germanic, and French law; in the second and third with persons and the family; and in the fourth and last with things and contracts. Under the last-mentioned division come comprehensive sections on *fiefs*, *emphyteose*, *précaires*, *cens et rentes*, *alleu* and *franche aumone*, and the *complexum feudale*, while the observations therein upon the abolition of feudal rights are especially useful and interesting. If M. Viollet is great as a Canonist, his achievement with reference to the *Etablissements de St. Louis*[1] is sufficient evidence of the still wider scope of his historical researches. Indeed, no history of law in any language, not excepting that of Sohm, but perhaps only the *Manual* of M. Brissaud, compares in practical erudition with the one now under notice. If it cannot vie in extent with the larger works of M. Glasson, M. Taine, and M. Fustel de Coulanges, this one-volume history surpasses the somewhat similar treatises of M. Esmein and M. Ginouilhac in completeness and critical treatment, so that it, like M. Brissaud's *Manual*, may be fairly said, owing to its excellent methods, to be a pioneer in the existing revolution in the training of French legal students, which we trust will continue not only to run, but also to prosper in its course.

[1] 4 vols., Renouard, Paris, 1881–1886.

"For, by the now general adoption of the comparative historical method in the educational medium circulating in her schools of law, the France of to-day seems once and for all to have discarded the *à priori* conceptions of Rousseau's disciples and the other empirics of the last century. In the dry light of this method it is plainly seen that to Roman privileged classes succeeded similar German ones, who by no means revived liberty as was heretofore popularly supposed; and further, that privileged institutions, of whatever sort, are not parasites, as was wont to be thought, but primary cells of the body politic. These and many other like truths are set forth succinctly in order in the modern French legal text-book."

Actions by Prisoners.—What would an ancient or mediæval tribunal have said to an action for damages by a prisoner against the Crown for injuries by an accident in prison—*e.g.*, having his eye injured by the bursting of the glass gauge of a machine which the prisoner was set to watch? It is significant of the progress of humanitarianism that such a claim should have been fully and sympathetically discussed by the Supreme Court of New South Wales (*Gibson* v. *Young*, 21 N.S.W.R. Part I. 7). In England an action of this kind could not be maintained owing to the immunity enjoyed by the Crown, but it is otherwise in New South Wales. There the Claims Against the Colonial Government Act, 1876, gives a right of action against the Government for a tort committed by the Government by its servants, and places the Government as defendant in exactly the same position as a private citizen; but it is one thing to admit the general principle and another to say that it is not subject to exceptions on the ground of public policy. As Lord Hardwicke once said, "Political arguments in the fullest sense of the word as they concern the Government of a nation must be, and always have been, of great weight in the consideration of the Court," and the Court in the New South Wales case was guided by this view of public utility. If once it were known that a prisoner could bring an action, whether well or ill founded, against a gaol official or the Government, the firm control so vitally essential in prison life would be lost. Discontented prisoners, as the Court pointed out, would be encouraged to bring actions on the allegation that their food was unfit for consumption; that their cells were badly ventilated or otherwise unfit for occupation; that insufficient bedding or unsuitable clothing was supplied to them; that they were compelled to take too much exercise or do too much hard work, in consequence of which they suffered in health; and a hundred other pretexts might be put forward by them as grounds for harassing the authorities in like manner. The result would be that the management of gaols would be taken out of the hands of skilled officials and would be replaced by the uncertain and unskilled management of the jury box. The care and consideration shown to prisoners under the prison system of the Colony make it very unlikely that the denial of a right of action will encourage harshness or negligence by gaol officials.

"West African Studies," by Miss Mary Kingsley—Spirits as Policemen.—Miss Kingsley might call her picturesque writing a "word swamp," but there is not a dull page in it. These *Studies* teem with interest. The chapter on "African Religion and Law," for instance—what a vista of new ideas it opens up to the student of comparative jurisprudence! Not without meaning are the two—religion and law—coupled together, for in West Africa the spirit world pervades and animates everything. As Miss Kingsley humorously puts it, "the spirits put into a charm are the police force," and much more effective. Your human policeman can be evaded or outrun if you steal a few potatoes from a field, but the spirit policeman cannot be so circumvented when he hangs *done* up in a bit of rag or put inside a little horn on guard over an African farm. He will most certainly have you, and you will swell up and "bust." "You will see this," she says, "strikingly illustrated when, as you walk along a bush path far from human habitation, you notice a little cleared space by the side of the path; it is neatly laid with plantain leaves, and on it are various little articles for sale—leaf tobacco, a few yams, and so on—and beside each article are so many stones, beans, or cowries which indicate the price of each article, and you will see, either sitting in the middle of the things, or swinging by a bit of Tie Tie from a branch above, Egba, or a relation of his—the market god—who will visit with death any theft from that shop, or any cheating in price given, or any taking away of sums left by previous customers. You can always tell which are the articles already paid for things taken, and which are those you can take and welcome if you pay cash down, because those for sale have the prices marked up. Again, the plantation of a Ba' Akele, or Fan town, are not in the manner of fenced-in back gardens; they are open clearings, sometimes a mile from the town they belong to. Sometimes for weeks at a time no one of their owners is near them by day; at night the slaves, or lower members of the family, go up to the little hut in them and scare off the gorillas, elephants, bush-cows and bush-pigs, but during the day there is nothing to guard them from human robbers but the *bian*. Also there are the spirits who are kept and fed in little miniature huts on the verges of the plantation towards the forests, and whose work it is to help the human owner to keep down the evil weed spirits that invade it from the forest. Or you can take a canoe and drop down beside the slimy banks of any oil river you choose, and you will see quantities of fish traps, every one of them guarded, and practically efficiently guarded, against human depredations by charms; or, away in the Gorilla-land Forest, you will see, miles from any sign of human life, piles of cut billets of ebony, or rubber vine, each with its *bian* on, and if you were a Fan desirous, as is common with Fans, of taking those things, you would hold it policy first to kill the human owner of them wherever he might be."

Copyright and the English-Speaking Races.—"The ideal," as Jowett

once said, "though it cannot be carried out, may be a good guiding principle." The visions of a perfect State as they "flashed upon the inward eye" of a Plato, an Augustine, a More, or a Bacon were no mere *jeux d'esprit*, beautiful, ineffectual: they have moulded, as lofty imaginations always must do, the destiny of the world, the legislation of nations.

Here is a thought of the United States Ambassador, speaking to an address by Mr. Augustine Birrell on "The English Literature of the Nineteenth Century," which is to-day a dream, but which to-morrow may bear noble fruit—who can say?—

> The English language (said his Excellency), in its wonderful fluidity and rapid spread, recognises no international boundaries, and carries the thoughts which it expresses around the globe with the speed of steam and electricity. No nation can appropriate as its own a good book simply because it has been produced within its borders. It becomes at once the property of the English-speaking race, who would have it in all the continents and all the islands of the sea. And as all readers everywhere get the benefit of the brains of all authors, is it a mere fanciful dream, or will it only be realised in the distant future—in the millennium of English literature—that all authors should get the reciprocal benefit of all this reading, without regard to international or colonial limits?—so that a copyright properly secured anywhere should be good everywhere, like any other right of property, so that whether issued at Washington or London, or Melbourne or Montreal, it should protect its own wherever the English or American flag flies, or the English or American language is spoken—just as the English sovereign or the American gold eagle bearing the national stamp passes current at its face value all over the world?

Discharging a Volunteer without a Hearing.—*Inter arma silent leges* receives a fresh illustration from a recent New South Wales decision (*Exparte Byrne*, 21 N.S.W.R., Part II. 93). If there is one principle of justice which we are accustomed to regard as more elementary than another it is that a man shall not be condemned unheard, but the *salus reipublicæ*—the exigencies of military discipline—may require even this to be dispensed with. In the case in question a volunteer—a corporal in the New South Wales National Guard—was summarily dismissed by an order signed by the commanding officer in these terms: "It is notified for information that Corporal S. J. Byrne is discharged from this date under Clause 28, Par. 1, of the Volunteer Force Regulation Act, 1868." Par. 1 empowered the commanding officer to discharge any volunteer "either for disobedience of orders by him while doing any military duty with his corps or for neglect of duty or misconduct by him as a member of the corps, or for other sufficient cause, the existence and sufficiency of such causes respectively to be determined by the commanding officer." On receiving the notice Byrne wrote to the commanding officer asking who had preferred a charge against him and what was the nature of the offence, to which the officer replied: "In my opinion there existed a sufficient cause for your discharge, and of the existence and sufficiency of such cause I am the judge"—*sic volo, sic*

jubeo. Thereupon Byrne refused to deliver up his arms, and the case came before Mr. Justice Cohen, who was not prepared to part with the wholesome maxim, *Audi alteram partem*, in favour of a despotic power, seeing no particular danger to discipline in giving a volunteer an opportunity of defending himself, and much injustice in dismissing him, disgraced, without it. But the Court of Appeal did not accept his view. "This is a purely military matter," said the Chief Justice, "and this Court cannot constitute itself a Court of Appeal from military tribunals. . . . To hold otherwise might lead to very serious results and to the subversion of discipline. If we held that it was open to the magistrate to enquire into the legality of a volunteer's dismissal, this would follow, that in every case where a commanding officer has acted erroneously, a prohibition would lie, or, again, whenever a volunteer was improperly discharged, an action would lie. That appears to me to be the reason why, in all the cases which have been cited to us, it has been held that the Courts cannot interfere with the decision of military tribunals unless they act entirely outside that jurisdiction, as, for instance, where they try a man who is not amenable to military jurisdiction, or where an officer exercises a power which the law has not conferred upon him. In the present case the commanding officer acted within his jurisdiction and therefore we cannot interfere. At the same time," continued the Chief Justice, "I trust that in nine hundred and ninety-nine cases out of a thousand a commanding officer of a volunteer corps will not discharge a man for misconduct or neglect without giving him notice of the charge and an opportunity of defending himself. Such a course is only right and just and in accordance with the British spirit of fair play."

Crime in Egypt and a Low Nile.—"There is a curious statement," writes Sir Raymond West, "in the report (of the Judicial Adviser to the Khedive) as to the admitted increase in 1900 of the offences called 'misdemeanours.' 'Amongst the causes at work which tend to augment the number,' the Legal Adviser enumerates 'the fact that justice is brought near to the doors of the people.' Such a result would be very unfortunate. What he means is, of course, that this accounts for an increase of recourse to the Criminal Courts. The small real increase of both 'misdemeanours' and the more serious offences called 'crimes' in 1900 appears to have been due to a low Nile, which greatly lessened the area of profitable employment. The proportion of convictions obtained in both classes of cases indicates a leaning towards the side of the prosecution which ought to be carefully watched and controlled. Ninety-two per cent. of those tried for 'misdemeanours' and eighty per cent. of those tried for 'crimes' were convicted. Thus if Egypt has a still imperfect police, the evil is balanced by judges having very easy-going ideas of evidence, and of the presumptions in favour of innocence.

—— **Religion and the Cadis.**—"In Egypt the administration of the religious law, which governs matrimonial and family relations, and also

inheritance, is a function, not of the ordinary Courts, but of the Cadis and of joint Courts called Mahkamahs. The Cadis and the Mahkamahs alike are as a rule extremely ignorant. The inferior Cadis are paid on a scale which invites to corruption. The law is uncodified and indefinite. Practical precedents have little or no weight as against any sacred text or ancient interpretation construed according to the opinion of a contemporary mufti. The progress of legal development in other departments has left the religious Courts stranded on the desert sands of an antique and barren system. Thus some of the most important interests of society are left uncertain and subject to the caprices of a perverted half learning almost worse than simple ignorance. A commission appears to have been formed a couple of years ago for the purpose of devising a reform of these unsatisfactory tribunals; and it has recommended a reduction of their number, which may perhaps mean a reduction of mischief. But a more thoroughgoing reform is imperatively called for. Experience has shown again and again that no real and permanent amendment or expansion of the archaic Mohammedan law can be expected so long as the old machinery is retained. The religious Courts should be placed side by side with the ordinary tribunals and subjected to a similar superintendence. Then they should be made special branches of the ordinary Courts, with judges interchangeable. Finally a complete fusion should be effected. The recognised Mohammedan principle in such cases is to take the law in a 'fatwa' or 'sententia' from a mufti, and this any Bench of an ordinary Court could do as well as the Cadi. For form's sake a Cadi could be retained as a member in every considerable Court. But what is really needed is that the light of intelligence and jural principles should be brought to bear on a branch of litigation of almost immeasurable importance. The experiment has been successfully tried elsewhere. In India, the largest Mohammedan population in the world, and now also the most intelligent, are quite content with the dispensation of the family law, drawn from precisely the same sources as in Egypt, by the ordinary Courts. Really learned Mohammedan judges are to be found in those Courts, and the acuteness of the educated Bar places the law as well as the facts before the Courts in a far more complete and sufficient form than the frequently irrelevant sentences of a mufti. It may need some slight courage to make the requisite corresponding reform in Egypt, but no less thoroughgoing a scheme can be more than temporary. There is no need for any disturbance of the religious basis on which the Mohammedan family system rests, but on that basis room should be found for growth and progress, without which, in spite of material prosperity, Egypt must remain in a state of imperfect civilisation."

A Forensic Strike.—In the reports of decisions in the Courts of Ceylon in 1900, kindly communicated to this Journal by the Colonial Secretary, is an account of an application probably wholly novel. The plaintiff, a member of the Municipal Council of Colombo, sued the defendant, Acting

Mayor of the Council, for libel. The defendant appointed a proctor (solicitor) to act for him, and instructed him to retain an advocate to appear for him. The proctor made an affidavit stating that the Acting Attorney-General and all the leading advocates practising on the civil side of the Colombo Courts had declined to act for him. Advocate Elliott, for the defendant, applied to the Court that counsel be assigned to the defendant. It was admitted that no retainer and no fee had been formally offered. The Court refused the request, for the following reasons, given by Bonser C.J.:

The application is one, so far as I know, without a precedent in this island. It is said that the plaintiff has engaged a certain number of advocates whose names are mentioned, who are all respectable men in respectable practice, to appear for him, and that others who are equally respectable have declined to appear for the plaintiff, because they are afraid that they may in some way or other be involved in litigation. It is said that the Acting Attorney-General thought it advisable not to act for either party, in view of his being a law officer of the Crown. I do not quite see how his being a law officer of the Crown is an impediment to his appearing in this case. But he is not the only law officer of the Crown. It may be that it is desirable that one of them should be free to take an unprejudiced view so as to be able to advise the Government, but there is another law officer of the Crown, and it does not appear that any application was made to him or to any of the Crown Counsel. I notice too, that there are other members of the Bar of standing and position who have not been applied to by the defendant, and under these circumstances I do not see that there is any foundation whatever for this application, even if it had been quite clear that this Court had the right to interfere. I do not say that it has no right to interfere. If a party to litigation should retain the whole roll of advocates, it would amount to a public scandal and might occasion injustice. In that case this Court might feel justified in interfering, but no such case has been shown to have arisen here. There are a number of competent advocates who have not been applied to, and there is no reason that I know of why these gentlemen should not take up the case.

Utilising Condemned Criminals.—It will probably startle many persons to hear that the number of lynchings in the United States for a period of thirteen years—from 1886 to 1899—was 2,224; but the feeling of surprise will considerably abate on discovering that the number of legal executions during the corresponding period—in respect of 86,825 murders and homicides—was 1,559; that is to say, about one criminal in every fifty-six received the reward of his deeds. It is in this disproportion between crime and its penalty—the practical immunity of the murderer—that we must find the explanation of the prevalence of lynching in the States. It is not a summary remedy resorted to only in the "Wild West" or in districts where no organised system of justice exists; it is a widespread protest against the impotence of the regular tribunals, and a rude attempt to supplement their shortcomings. Societies, like individuals, possess an instinct of self-preservation. But to probe a little deeper—why this impotence, this disproportion between crime and its legal punishment? Because, says a writer in the *American Journal of Sociology*, in capital

punishment the State fails to fit the punishment to the crime. It simply gets rid of the criminal by killing him, and in doing so, loses sight of a most important element in punishment—viz., that the criminal owes reparation to the society against which he has sinned. Hence the distastefulness of the capital penalty to thinking Americans; hence the "wild justice" of the mob. What the State ought to do, says the writer, is to utilise the criminal, not efface him; and how can it do this better in these scientific days, asks a reformer, who has the courage of his opinions, than by experimenting on him—subject always to proper safeguards—for the good of society and the advancement of anatomy, physiology, psychology, criminology, and every branch of therapeutic medicine? We in England made a beginning long ago, by handing over the corpse of a criminal after execution for dissection, but have not followed it up.

Side-paths for Bicyclists in America.—The English cyclist has often sighed for better roads—sometimes even dreamed of a Utopia in which a track, sacred to the cyclist, was laid by the roadside, along which he might smoothly spin in winter as in summer, and while he has been dreaming the thing has been done in the "States." The Legislature of the State of New York has by c. 640 of the Laws of 1900 empowered the county court judge of any county on the petition of fifty resident wheelmen to constitute a Board of Side-path Commissioners for the county. This Board is authorised to construct and maintain—with the written approval of the Commissioner of Highways—side-paths along any public road or street. The paths are to be not less than three or more than six feet wide, except with the consent of the owners of the abutting land. A material point in the Act is that the side-path is only to be used by persons who have obtained a licence from the Board. This they may do on payment of a fee—to be determined by the Board—of not less than fifty cents or more than one dollar. The licence, or badge representing it, is to be carried affixed to the left side of the front fork of the bicycle. The fees so paid are to form a "Side-path Fund" for construction and repair of the paths. Ten miles an hour is the pace for the path when passing another cyclist or a pedestrian, on peril of a fine of twenty-five dollars. Horses, cattle, sheep, and other animals are not to be led or driven upon the path.

Jurisprudence and Philology.—In the latest number of the *Revista de Legislaçion*, published in Madrid, is an article on "The Criminal Law in Primitive Spain" by Senor Derado, which shows, among others things, how philological and juridical enquiries may aid one another. He proves, chiefly with the aid of Costa's *Estudios Ibericos*, that there are points of affinity between the ancient jurisprudence of the dwellers of the South of Spain and the Kabyles in the North of Africa. A second point brought out is the existence in Spain of traces of *dharna*—coercion of a debtor by sitting down in front of his house. Maine illustrated its existence in India and

Ireland, and modern investigators have found vestiges of it among the Iberians. A third point, still more novel, is the existence in primitive Spain of a relation known as *devotio* or κατάσπεισις—a relationship described by Plutarch and alleged to be wholly independent of feudalism. The fourth point, the most novel of all, is the evidence that there existed in Spain a class corresponding to the *brehons* in Ireland. The article suggests an impression that much similar work might be done in other other parts of Europe. Unfortunately, the race of scholars of whom Jacob Grimm was the greatest—jurists as well as philologists—is almost extinct.

"Trusts" in America.—The commercial world has of late been much scared with the spectre of "trusts," but if a writer in the *Columbia Law Review*—Mr. Albert Stickney—is to be believed, there is nothing to be feared from these industrial combinations. The corporate trust is nothing more than the individual trader "writ large." The proposition he affirms is that absolute freedom of contractual combination as to the selling price of their own property is logically a property-right of the owners and sellers of merchandise precisely as it is of the owners and sellers of labour, and is recognised as such by the Common Law in America as well as in England (*Mogul Steamship Co.* v. *McGregor*); and it makes no difference, in his opinion, whether the owner is an individual or a corporation—the difference is only one of degree. The trust reckons its capital by hundreds of millions, for the private trader's hundreds or thousands; but the supposed tyranny of these gigantic capitalisations is a delusion. Employées are not threatened, for the larger the amount of capital involved in any single industry, the more is the employer at the mercy of his employées. A small employer in case of a strike can get new men; a larger one finds it next to impossible to train and organise an entire new working staff. It is the employées who are the real masters of the situation. Nor are purchasers threatened. The corporate trust is compelled to be the servant of society. The purpose of those who form these large modern trusts is no doubt to kill competition, with a large resulting profit to themselves, but they always end by conferring a benefit on the community in the shape of lower prices.

"History," says Mr. Stickney, "shows that notwithstanding the fact that producers and speculators have made innumerable attempts to raise the prices of all kinds of merchandise, every rise in prices which has ever been accomplished by those men has been very limited in both locality and time. It has never done any serious injury, and the reason is that success in any such venture is made a practical impossibility by the unvarying laws of commerce. The first attempt to raise prices results in a curtailment of purchases. Purchasers wait for prices to go down. They use other things. They go without. If speculators put up the price of wheat, people eat potatoes or corn or rice. . . . Meantime the interest account is always running, and that fact soon brings the speculators to their

bearings. As a rule the only persons seriously injured are the speculators, and they are entitled to small sympathy."

These optimist views of Mr. Stickney are interesting as contrasting with those entertained by many eminent lawyers and economists on this subject.

Mr. Barton's Proposal as to the New Hebrides.—Attention has not in this country been called to the suggestion made by Mr. Barton, the Prime Minister of the Australian Commonwealth, in a recent speech in Melbourne. It is worth while citing his words :—

> As you know, there is an agreement between the United Kingdom—I would rather call it the empire—and France as to the appointment and the carrying on of a joint Commission to deal with certain affairs in the New Hebrides. The agreement leaves out—and may have left it out because it was a difficult and dangerous subject to deal with—the subject of the ownership of land, and there is no tribunal to which any person—native, English, or French—can appeal on such disputes. It seems to us, listening to the representations we have heard and paying due attention to anything advanced in a contrary direction, that the situation would be largely improved if his Majesty's Government could see its way to induce the Government of France to join in the appointment of some tribunal or Commission which might settle these disputes about land. If that cannot be done, and it is so decided, we may, at any rate for a time, have to possess our souls in patience, but we, as a Ministry, are satisfied that if the Government of France can be induced to join with the Government of Great Britain in the appointment of any such tribunal, many complaints, charges, and counter-charges may be settled by an impartial decision, and that affairs can go on much more smoothly in these islands.

The Law of Prize.—Mr. Everett Wheeler contributes to the *Columbia Law Review* an account of the decisions of the United States Courts on prize cases arising out of the war with Spain. One of the decisions (*i.e.*, *Paquete Habana*) affirms the rule, which has gradually obtained recognition in International Law, that fishing vessels honestly pursuing the calling of catching fish, and not engaged in obtaining information or otherwise acting as spies, are exempt from seizure by a blockading squadron. Mr. Wheeler points out that the decision in another case, that of the *Panama*, must have important consequences. Following a well-established usage, the President issued at the beginning of the war a proclamation with reference to Spanish merchant vessels, giving them a period wherein to depart in safety and to continue their voyage, provided they had not on board any coal (except such as might be necessary for their voyage) or any other article prohibited, or contraband of war, etc. The *Panama*, a mail steamer, had on board for over three years five cannon, and for over two years some rifles and ammunition, and she was constructed with a view to possible use in war. The Court held that the vessel came within the proviso. As Mr. Wheeler observes, "the principal maritime nations of the world have contracts with the owners of steamships similar to those which the Spanish Government had with the company to which

the *Panama* belonged. If this decision should be adopted by our Courts, it will take all such vessels out of the protection given by proclamation to vessels sailing from, or bound for, the port of one belligerent at the time of outbreak of hostilities." By the way, why is there no series of reports which would give information as to prize cases decided in all Courts?

Imperial Copyright.—Lord Thring, writing in the *Empire Review* on Imperial copyright, *apropos* of the Government Bill to consolidate the law relating to literary copyright, remarks:—

> The objection has been urged to this Bill that although Canada is satisfied the other self-governing Colonies must give their assent before it is brought into Parliament. A little consideration, however, will show that it cannot be reasonably objected to by the Colonies. First, it confers a larger measure of copyright on the colonial as well as British authors; secondly, it reserves to the Colony the full and unimpaired right of colonial legislation, that is to say, the right to regulate copyright as it pleases within its own borders. More than this, it reserves to the Colony the right of importing foreign reprints. Lastly, it confers on each Colony the right of protecting its own market by the prohibition of the importation into a Colony of British copies of a work for the publication of which an exclusive licence has been granted to a colonial publisher. In short, a Colony has all the benefits of the Imperial legislation, and at the same time it can, if it pleases, create an exclusive market for books printed within its own area. It is, however, possible that some Colony may be so ill-advised as to refuse its assent to the Bill. If such an unlikely event should occur, it remains to take the course of excluding that Colony from the operation of the Bill, and of allowing the existing law to apply to that Colony, giving, if it be thought fit, power to the Colony to adopt by a colonial Act the new law.

The Legislative Machine in England.—Sir Courtenay Ilbert's *Legislative Methods and Forms* derives a peculiar value from its author's unique knowledge of the theory and practice of law-making in England and the inner working of the legislative machine. The "legislative machine"! That phrase, to begin with, as Sir Courtenay Ilbert points out, embodies a very misleading description of the functions of our English Parliament. Its primary function was, and still is, not to legislate in the Napoleonic sense in constructing grand laws or codes on scientific principles of jurisprudence, but to grant supplies, to criticise and control the administration, in fine, to keep the machinery of the State in working order. The result has been, in the new era which succeeded the Reform Act, "the building up piecemeal of an administrative machinery of great complexity, which stands in as constant need of repair, renewal, reconstruction, and adaptation to new requirements as the plant of a modern factory." Piecemeal legislation has in its turn generated the necessity of consolidating Statutes, and this is the business in which we are now involved. Much useful work in this way has been done in the last twenty-five years—the Acts as to stamps, public health, mortmain, lunacy, municipal corporations, copyholds, trustees,

friendly societies, to name only a few, have been consolidated; but still more remains to be done, and in the face of that fact it is disappointing to hear that "the work of consolidation has for the present been arrested." Persons talk glibly of consolidation as if it were an affair of scissors and paste. A perusal of Sir Courtenay Ilbert's chapter on that subject will speedily dispel the illusion; but the chief enemy, after all, is apathy. In the meanwhile, can we wonder that with English law in its present chaotic condition as to form, whatever its real merits, countries like Japan look to France rather than England for their models in legislation?

Stagnation in Codification.—One of the most interesting chapters is on "Codification." The Hegelian principle that every truth is but half of a higher truth, finds an apt illustration in codification. Bentham's theory had its truth—that all law, substantive and adjective, might and ought to be expressed in an orderly series of brief authoritative propositions—but it ignored the historical continuity of the law—its organic growth. Savigny emphasised the importance of the historical treatment of the law—that we cannot break with the past. This was his truth; but he underrated the value of codification—its practical utility. The modern view of codification comprehends both these. Codification is an orderly statement of the leading rules of law on any given subject, but there is nothing final in it, nothing to arrest or check the natural growth and development of the law; on the contrary, the very necessity of formulating the law exhibits its defects, and stimulates, while it simplifies, amendment. But the best argument for codification is to be found in its general adoption by civilised nations. France, Germany, Austria, Hungary, Switzerland, Belgium, Italy, Spain, and Portugal have all their Codes, more or less complete. So have California and the State of New York. In India all the most important branches of English substantive law applicable to India have been codified. Among the British Colonies, Canada, New South Wales, Victoria, New Zealand, and Queensland have Criminal Codes; Ceylon and the Straits Settlements have adopted some of the Indian Codes. Grenada and others of the West Indian Colonies have been active in codification. And England? It stands aloof in inglorious isolation, despite the admirable specimens of what may be done in this way in the Partnership Act of Sir Frederick Pollock, and the Bills of Exchange Act and Sale of Goods Act of Mr. M. D. Chalmers. "It is impossible," says Sir Courtenay Ilbert, "to view with satisfaction, or indeed without a certain degree of humiliation, the entire cessation during recent years of any effort to improve the form of English law and the apathy with which that cessation has been regarded." If we cannot codify our Criminal Law and procedure, at least, Sir Courtenay Ilbert thinks, we might pass a short Act, as was done for Scotland in 1887, scheduling a few simple forms of charges in place of the cumbrous and prolix indictments required by existing practice.

—— **Its Causes.**—To what are we to ascribe this ill success of codifica-

tion in England? To many causes: (1) To begin with, the sense of form, of logical system or symmetry, so marked in the Latin races, is very defective in the average Englishman. (2) Law here is not a young sapling, to be trained or transplanted, but an old and gnarled oak. (3) Parliament is not disposed to take any large measure of codification on trust; and once discussion begins, there is little hope of the measure passing. (4) The failure of past attempts at codification has bred a feeling of despair among its adherents. (5) Professional lawyers, as Sir Courtenay Ilbert points out, take no interest in the question—an indifference due to the defective and haphazard system of English legal education, under which the student is usually left to pick up odd fragments of knowledge in Court or in barristers' chambers, and is rarely encouraged to take any general or scientific view of the principles which he has to apply. (6) Lastly, there is in England no force compelling to codification. In Germany and other Continental nations a desire for national unity supplied the necessary impulse. In British India it has been supplied by "administrative exigencies." Here in England we get along, somehow, without it—as Lord Thurlow said, when asked how he got through his work as Chancellor, "Much as a pickpocket gets through a horse-pond; he must get through"—and we rest ignobly content. The only effective demand for codification in England has hitherto come from the commercial classes, and it is from this quarter, it is to be hoped, that a fresh impulse will be given to the movement, and on an imperial scale, for is not the drawing together of all parts of the empire, and the growth of commercial intercourse, in particular, throughout it, fast supplying a compelling force like that of the aspiration after national unity which gave Germany her admirable Codes?

Recalcitrant Spouses and Judicial Separation.—The Superior Court at Montreal has lately had to decide, on first principles, what a husband's remedy is when his wife leaves him without any just cause and refuses to return (*Doyon* v. *Dame* v. *Riopel*, 17 Rapp. Jud. de Quebec, 488). Under Art. 197 of the Civil Code of Quebec it has apparently been decided that a husband refusing to receive his wife and to supply her with necessaries is not a ground for a *separation de corps*; but a wife's refusal to return to her husband is, it would seem, a matrimonial offence of a deeper dye, and not only entitles the husband to a *separation de corps*, but relieves him from any obligation to supply her with "aliments." Allowing for this inequality, that what is sauce for the goose is not sauce for the gander, the decision seems a sound one. A wife deserting her husband and refusing to return may justly be designated *injure grave*. It is not only a frustration of all the ends of the matrimonial compact, but it leaves the husband in the situation of being married without any of the amenities of the married state, or the power of contracting a fresh union. It is the peculiar seriousness of this wrong which has led English law to grant that singular anomaly, specific performance of the matrimonial contract in the

shape of a decree for restitution of conjugal rights; and though it no longer enforces the decree by imprisoning the contumacious spouse and gives the Court power to order a judicial separation instead, it still in form enjoins such spouse to return to cohabitation and render conjugal amenities. Yet it must be confessed that a judicial separation or a *separation de corps* is at best an inadequate and very unsatisfactory remedy, and the relations it creates little short of a satire on marriage. The epithet which the President of the Divorce Division chose in a recent case to sum up the situation of the separated spouses was "deplorable"; and the worst is that under the summary matrimonial jurisdiction of magistrates in England the judicial separation is becoming increasingly common, with a corresponding danger to social morals.

Vagabondage in France.—We in England have long ago coupled together the rogue and the vagabond. Not that there is any crime in vagrancy *per se* —was not even so respectable a person as Dr. Johnson's *Rambler* rendered into Italian as *Il Vagabondo*?—but the habits which a life of vagrancy generates are dangerous to society, and France—to judge from an article by M. Paul Matter in the *Annales des Sciences Politiques*—is just now becoming very sensible of the fact.

The number of "vagabonds" there is steadily increasing. The convictions have risen from six thousand in 1860 to close upon twenty thousand in 1890. This army of delinquents comprises many whose sentences are self sought to get shelter till the return of *la belle saison*, but it also comprises a large proportion of professional criminals. The causes of this vagrancy—we know them well—are drunkenness, impoverishing, employment-losing, will-destroying drunkenness, a first conviction entailing banishment from the home, inveterate idleness—the *cortége de vices*—aggravated by the immigration which in France as well as in England has set in from the country to the town. In dealing with vagrancy nearly every European country has its special system, partly preventive, partly repressive; but in the midst of these diversities of treatment, the idea, says M. Matter, which is becoming dominant is the necessity of distinguishing between the unfortunate workman reduced to vagrancy by illness or want of work and the professional of the highway, the vicious vagabond, the drunkard, the *souteneur*, and the incorrigible idler. But then comes the question, how is the sifting to be done? for the practised vagrant, when asked why he is a vagrant, at once replies that he has been vainly seeking for work all day. Take them at their word, says M. Matter, and offer them work. This is the touchstone and the remedy. But who is to apply the test? During the early part of the last century France had its depôts for this purpose, organised and governed by the State, but the experiences, says M. Matter, of the depôts of 1808 and of the *ateliers nationaux* of 1845 show that this kind of help ought to be left to private individuals and repression reserved to the State, and he urges that local

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THE LAW QUARTERLY REVIEW.

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